Boston College Law Review

Volume 21
Issue 4 *Number 4*

Article 1

5-1-1980

The Burger Court And The New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's

M David Gelfand

BOSTON COLLEGE
LAW REVIEW

VOLUME XXI MAY 1980 NUMBER 4

THE BURGER COURT AND THE NEW FEDERALISM: PRELIMINARY REFLECTIONS ON THE ROLES OF LOCAL GOVERNMENT ACTORS IN THE POLITICAL DRAMAS OF THE 1980's†

M. DAVID GELFAND*

During the 1970's, the Burger Court rendered a series of crucial decisions which appear to redefine the relationship among local governments, individuals, state governments and the federal government. Some of these cases required rulings on claims that certain local government policy choices had violated the constitutional rights of individuals,[1] while others required a determination whether the federal or the local policy choice should prevail.[2] They involved such diverse subjects as the zoning practices of a Chicago suburb, alleged to infringe upon equal protection rights,[3] and the conditions attached to receipt of federal health care funds, alleged to violate the tenth amendment.[4] In some cases, local government policy decisions were upheld;[5] in others, they were invalidated.[6] Though city attorneys, real estate develop-

* Associate Professor, Tulane Law School. J.D., 1976, Columbia University Law School; M. Phil., 1974, Oxford University; B.A., 1971, Columbia University. The author gratefully acknowledges the utterly invaluable assistance provided by Lisa Shelton at every stage of the development of this article, from early research through final editing. Research assistance on various portions of the article was also provided by Sue Peppard, Bill Cassell, Russell Stegeman, Michael Magner, and Stacy White.

[1] *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490 (1975); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[2] *See, e.g.*, City of Rome v. United States, 100 S. Ct. 1548 (1980); North Carolina v. Califano, 435 U.S. 962 (1978); Brown v. EPA, 431 U.S. 99 (1977); National League of Cities v. Usery, 426 U.S. 833 (1975).

[3] Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

[4] North Carolina v. Califano, 435 U.S. 962 (1978).

[5] *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979); Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977); National League of Cities v. Usery, 426 U.S. 833 (1975).

[6] *See, e.g.*, Village of Schaumberg v. Citizens for a Better Environment, 100 S. Ct. 826 (1980); U.S. Trust v. New Jersey, 431 U.S. 1 (1977); Hynes v. Mayor & Council of the Borough of Oradell, 425 U.S. 610 (1976).

ers, environmentalists and others whose plans revolve around municipal affairs must seek guidance from this entire range of opinions, commentators have generally focused upon a single term of the Burger Court or have surveyed only decisions in particular fields. By contrast, this article explores an array of Burger Court decisions in a variety of fields that impact directly upon local governments as political entities. It attempts, first, to articulate the themes underlying the Court's developing federalism and, second, to suggest the conceptual and practical shortcomings of these themes.[7]

The first section views federalism, as expounded by the Burger Court, from a local government perspective. A general pattern of broad judicial deference to local government programmatic choices, as against constitutional rights asserted by individual litigants, emerges. This federalism-based deference to local "self-rule" is, however, subsumed within a larger pattern of Burger Court deference to Congress. Though the Court has made a brief and dramatic attempt to impose some limits on congressional interference with local governments in their capacity as providers of services,[8] this doctrinal innovation appears likely to protect little more than local (and state) government structural arrangements. The result is that appropriately crafted congressional enactments, whether to advance individual rights or to promote general welfare, can nearly always overbear the Court-espoused federalism restraints on national policymaking.

Since a congressional spending program (with conditions reflecting national goals attached to the receipt of federal aid) is the most effective means of overriding "state sovereignty" and local government authority, the article next turns to an analysis of the current local financial pressures created by the taxpayers' revolt and urban fiscal crises of the 1970's. These pressures, it is suggested, severely impair the ability of local government officials to bargain with federal administrators for assistance and, as a corollary, force the former to accept increased federal control over their affairs. Hence, the restraints upon federal government overreaching in this relationship will be the result more of financial than of judicial developments. Indeed, some of the Court's recent opinions may actually weaken the overall bargaining position of local government actors.

Finally, the article examines the area of aesthetic and environmental regulation as a case-in-point to illuminate and test the conclusions reached. It then projects likely political and legal scenarios for local governments during the new decade.

I. Setting the Stage—Political and Constitutional Principles

A. *Local Government Roles*

"It is for men to choose whether they will govern themselves or be governed."

—Henry Ward Beecher (1887)[9]

---

[7] While much of the analysis applies to state-federal relations as well, this article examines the Burger Court's constitutional development primarily through a local government lens.

[8] *See* National League of Cities v. Usery, 426 U.S. 833 (1975).

[9] H. Beecher, Proverbs from Plymouth Pulpit (1887).

"Government is a contrivance of human wisdom to provide for human wants."

—Edmund Burke (1790)[10]

The social science literature about American local government identifies two principal governmental roles: (a) local governments are (or can be) organs of democratic self-rule, and (b) local governments provide basic public services to their constituents.[11] Since controlling the provision and mix of local services is an important reason for seeking and maintaining political self-rule, these two local government roles are often interrelated. Yet, they are conceptually distinct perspectives, and they must be distinguished in order to provide an adequate elaboration and critique of the Burger Court decisions affecting local government.

The self-rule perspective is a manifestation of the deeply felt notion, articulated as part of democratic theory, that government is most effective when it is closest to the people. It was the principle behind the creation of the federal system and the Massachusetts town meeting[12] during the early history of our country, the home rule reforms of the 1875-1912 period,[13] and the urban "community control" movement in the 1960's.[14] As these historical

---

[10] E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 88 (1791).

[11] *See, e.g.*, C. ADRIAN, GOVERNING OUR FIFTY STATES AND THEIR COMMUNITIES 92-95 (1963); E. BANFIELD & J. WILSON, CITY POLITICS 18-24 (1963); D. YATES, THE UNGOVERNABLE CITY: THE POLITICS OF URBAN PROBLEMS AND POLICY MAKING xii-xiii, 4-10 (1979).

[12] *See* J.F. ZIMMERMAN, THE NEW ENGLAND TOWN MEETING: A TENACIOUS INSTITUTION (1967).

[13] These were the "formative years," but many states (especially in New England and the South) did not adopt home rule provisions until after World War II. *See* Vandlandingham, *Municipal Home Rule in the United States*, 10 WILLIAM & MARY L. REV. 269, 270, 277 (1968). As a political symbol "home rule" was a rallying cry for municipal reformers, who often did not agree upon the extent of local autonomy to be achieved, or the methods of achieving it. Thus, it was difficult to translate their abstract political demands into precise constitutional and statutory provisions. *See* Richland, *Constitutional City Home Rule in New York: II*, 55 COLUM. L. REV. 598, 623 (1955); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 645 (1964) [hereinafter cited as Sandalow]; Sperling, *Municipal Income Taxation and Home Rule*, 1 URB. LAW. 281, 283-84 (1969). Two general principles can, however, be distilled from the subsequently adopted home rule provisions—the affirmative grant of local powers to municipalities and the restriction of state legislative interference with municipal affairs. *See* Hyman, *Home Rule in New York 1941-1965 Retrospect and Prospect*, 15 BUFFALO L. REV. 335, 336 (1966); Sandalow, *supra*, at 667; D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 179-86 (1977) [hereinafter cited as MANDELKER & NETSCH].

[14] *See* H. HALLMAN, NEIGHBORHOOD CONTROL OF PUBLIC PROGRAMS (1970); M. KOTLER, NEIGHBORHOOD GOVERNMENT 36 (1969); D. YATES, NEIGHBORHOOD DEMOCRACY 4 (1973) [hereinafter cited as YATES]; Nordlinger & Hardy, *Urban Decentralization: An Evaluation of Four Models*, 20 PUBLIC POLICY 359 (1969) [hereinafter cited as Nordlinger & Hardy]. The 1968 conflicts between parents seeking "community control" over New York City's public schools and the teachers union which opposed it drew substantial public attention. *See* M. BERUBE & M. GITTELL, CONFRONTATION AT OCEAN HILL-BROWNSVILLE: NEW YORK CITY SCHOOL STRIKES OF 1968 (1969); N. LEVINE & R. COHEN, OCEAN HILL-BROWNSVILLE: SCHOOLS IN CRISIS (1969). For subsequent developments, see Rebell, *New York's School Decentralization Law: Two and a Half*

examples suggest, self-rule actually is composed of two subelements—citizen participation and community self-determination. The first focuses on procedures, such as town meetings and referenda, which make it possible for local citizens to participate in government decisions. The second involves the power of a local majority to make collective choices about the character, composition, and quality of its community, free of interferences from other levels of government.[15] Although there are important differences, both citizen participation and community self-determination place substantial emphasis upon input into decisionmaking and control over the local political process. They both raise the question, "Who decides?"[16]

On the other hand, many citizens and commentators have adopted Burke's notion that government's main purpose or role is to provide services.[17] Under this view, local government is merely an administrative unit within a larger system of state and federal public authorities, and functional efficiency—output—is the primary value. The principal policy question then becomes which level of government will most efficiently provide various public services.[18] The main concern is not who controls decisions about service delivery, but rather the levels, costs, and types of services delivered.

B. *Legal Typecasting*

In the United States, because of the institutionalization of the federal system in the national Constitution and of home rule in state constitutions (or statutes), these general political concepts are considered, if at all, only in the

---

Years Later, 2 J.L. & Ed. 1, 20, 30 (1973); Comment, *Conflict Resolution in a Politically Decentralized Local Government System*, 11 Colum. J.L. & Soc. Prob. 629 (1975).

[15] For a discussion of the importance of state sovereignty as a means of protecting individual participation as well as improving governmental processes, see Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 853-57 (1979) [hereinafter cited as Kaden].

[16] Urban political scientists have long been concerned with the question of who has power. The community power debate often involved acrimonious exchange between the "power elite" school, with Floyd Hunter as progenitor, and the "pluralist" school, led by Robert Dahl. *See* R. Dahl, Who Governs?: Democracy and Power in an American City (1961); F. Hunter, Community Power Structure (1953). Modern policy studies revolve around much more detailed questions about the process of decision-making and the exercise of power through the policy-making process. *See* Yates, *supra* note 14, at 10-11; *see also* Clark, *Who Governs, Where, When and with What Effects?* in Community Structure and Decision-Making: Comparative Analyses (T. Clark ed. 1968).

[17] This was for example, the perspective of those who advocated administrative decentralization as an alternative to community control. *See, e.g.*, Connery, *Governing the City*, in Governing the City 6 (R. Connery & D. Caraley eds. 1969); Kaufman, *Bureaucrats and Organized Civil Servants*, in *id.* at 45, 53; Macchiarola, *Decentralization—the Right Answer to the Wrong Questions?*, N.Y. Affairs 111, 114 (Spring 1974). *See also* Nordlinger & Hardy, *supra* note 14, at 359, 381-83.

[18] *See* Gelfand, *Decentralization—London and New York*, at 1-6, 15-18 (Trinity Term 1974) (M. Phil. thesis, Oxford Univ.) [hereinafter cited as Gelfand, *Decentralization*]. *See generally* R. Dahl & E. Tufte, Size and Democracy (1973); Area and Power, A Theory of Local Government (A. Maass ed. 1959).

context of narrower legal issues. Put in simplest form, when a particular local government "action"[19] is judicially challenged, the court must ask itself:

(1) does this government have the authority to perform this action?;

(2) does some other (special district, state, federal) government have conflicting authority and, if so, which should prevail?; and

(3) is this action beyond the scope of any government's authority?

The first question, which involves tracing grants of authority through constitutions, statutes, and ordinances, is not considered in this article. The second question requires the resolution of conflicts among federal, state, and local prerogatives. The Burger Court's handling of federal-local (and federal-state) conflicts, with its emphasis on the service-provider role of local (and state) government, is developed in Section III. State-local conflicts are considered in this article only insofar as they are affected by the resolution of other types of conflicts.[20] The third question involves a determination whether the challenged exercise of local government self-rule is delimited by individual rights. The Burger Court's approach to this question is elaborated in the next section.

II. Raising the Curtain— The Principles Applied

The Burger Court has shown its greatest deference to local self-rule in cases where it has rejected claims against local governments premised directly upon the Constitution. This deferential pattern is reflected not only in the Court's treatment of numerous substantive constitutional rights, but also in its handling of matters that might generally be considered procedural. In all these cases, the Court has ruled, in effect, that local self-determination overrides both individual choice and federal court decisionmaking at the behest of individuals, reserving only a limited exception for "fundamental" individual rights. While not always clearly articulated, the justification for these rulings appears to rest upon traditional majoritarian democratic theory, favoring authoritative decisionmaking by local political bodies over decisions by non-elected federal judges. Yet, other decisions of the Court do not show the respect for citizen participation which majoritarian democratic theory seems to dictate.

---

[19] It should be noted that inaction (a "nondecision") by government may often be just as significant as an affirmative act, and therefore may be subject to judicial challenge as well. For example, the plaintiffs in Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), were attacking a refusal to rezone. *See generally* P. Bachrach & M. Baratz, Power and Poverty: Theory and Practice 3-16 (1970) (arguing that "nondecisions" form a critical part of the political process); M. Crenson, The Un-Politics of Air Pollution: A Study of Non-Decisionmaking in the Cities (1971).

[20] For example, by requiring an express delegation from the State in order to protect a locality against antitrust liability, the ruling in City of Lafayette v. Louisiana Power and Light, 435 U.S. 389 (1978), may well undercut the pattern of broad-based home rule grants now employed in most states.

A. *Individual Choice vs. Community Self-Determination: Character Development*

1. Land Use and Exclusion

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation,*[21] potential developers of a federally subsidized low and moderate income housing project and a black prospective tenant[22] sued a Chicago suburb, which had a population of 64,000 persons, only 27 of whom were black.[23] These plaintiffs sought an injunction compelling the Village Board to rezone a 15-acre tract from single to multi-family residential, contending that the Board's refusal to rezone was racially motivated in violation of the equal protection clause of the fourteenth amendment.[24] The Supreme Court ruled that plaintiffs' showing of the racially discriminatory effects of the Village Board's zoning decision was insufficient to establish an equal protection violation.[25] Instead, the majority required proof of a governmental intent or purpose to discriminate on racial grounds,[26] to be demonstrated primarily on

---

[21] 429 U.S. 252 (1977).

[22] *Id.* at 261-64.

[23] *Id.* at 254-55.

[24] *Id.* at 254. The equal protection clause provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[25] *Id.* at 254-65. The Court relied upon the equal protection test employed in Washington v. Davis, 426 U.S. 29 (1976). Plaintiffs there were unsuccessful black candidates for the District of Columbia police force, who claimed that the unvalidated pencil-and-paper aptitude test required by the District violated the equal protection clause because blacks failed it at four times the rate of whites. The *Davis* Court held that the District of Columbia had a legitimate interest in increasing the literacy of its police force and that plaintiffs' showing of a disproportionate impact was insufficient to prove an equal protection violation. *Id.* at 245-46. The *Davis* Court strained to distinguish prior Supreme Court cases which it admitted contained "some indications to the contrary" and overruled a substantial number of lower court cases that had applied the disparate impact standard to equal protection claims in a variety of areas. *Id.* at 242, 244 n.12, 245. *See generally* Bienstock, *Section 1983 Problems and Concerns*, in S. ROSEN, G. STRICKLER & H. TEITELBAUM, FEDERAL CIVIL RIGHTS LITIGATION 83, 95-96 (1979). More recently, the Court, in City of Mobile v. Bolden, 100 S. Ct. 1490 (1980), employed the governmental intent test to uphold a local government's at-large election system against an attack based on the fourteenth and fifteenth amendments. The Court relied heavily on *Washington v. Davis* and *Arlington Heights* for the proposition that " 'a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.' " 100 S. Ct. at 1501. For a full discussion of *City of Mobile*, see notes 127-38 *infra* and accompanying text.

[26] 429 U.S. at 265. Intuitively, wealth discrimination might seem more to the point in a case like *Arlington Heights*. However, a showing of wealth discrimination alone would have been insufficient in light of prior Burger Court rulings that wealth is not a suspect classification invoking strict judicial scrutiny, *see, e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971), and that housing is not a fundamental interest such that an infringement would require strict judicial scrutiny. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972). The minimum rationality needed to justify local government wealth discrimination with respect to public housing could be met by showing that such discrimination served the community's fiscal interest, such as preserving property values and maintaining a higher tax base. *See* City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976)

the basis of the procedural history of the zoning enactment or decision.[27] The Court then concluded that plaintiffs had failed to carry their burden under these newly articulated standards.[28] It noted that the challenged refusal to rezone was consistent with the Village's usual policy on placement of multi-family housing,[29] and that the record reflected no procedural flaws or racially oriented statements by the Village Board or Plan Commission.[30]

(upholding mandatory local referendum for zoning amendments); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1134 (1978) [hereinafter cited as TRIBE]. *See also* R. FISHMAN, HOUSING FOR ALL 131 (1978).

[27] 429 U.S. at 257-68. The *Arlington Heights* majority first noted that "impact alone is not determinative" but only a starting point for inquiry. *Id.* at 266. It then listed the following factors to be considered in deciding if racially discriminatory intent is present: (1) whether a "series of official actions [had been] taken for invidious purposes;" (2) what "the specific sequence of events leading up to the challenged decision" was; (3) whether there were departures from procedures "usually considered important by the decisionmaker;" and (4) what the administrative or legislative history of the challenged enactment revealed via "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-68. Its focus upon the details of the governmental decisionmaking process, rather than upon the outcomes in terms of housing availability, indicates that the *Arlington Heights* Court viewed housing and the zoning process from the self-rule rather than the service-provider perspective. For a helpful critique of the Court's approach, see Lamb & Lustig, *The Burger Court, Exclusionary Zoning, and the Activist-Restraint Debate*, 40 U. PITT. L. REV. 169, 200-06 (1979) [hereinafter cited as Lamb & Lustig].

[28] The following footnote from the majority's opinion is particularly illuminating:

> Respondents complain that the District Court unduly limited their efforts to prove that the Village Board acted for discriminatory purposes, since it forbade questioning Board members about their motivation at the time they cast their votes. We perceive no abuse of discretion in the circumstances of this case, even if such an inquiry into motivation would otherwise have been proper. . . . Respondents were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision. In light of respondents' repeated insistence that it was effect and not motivation which would make out a constitutional violation, the District Court's action was not improper.

429 U.S. at 270 n.20. The Court was asking the litigants to anticipate its change from the discriminatory impact standard, even though Washington v. Davis, 426 U.S. 229 (1976), see note 25 *supra*, was not rendered until more than a year after the trial in *Arlington Heights*.

[29] 429 U.S. at 269. The Court observed that "the Village is undeniably committed to single family homes as its dominant residential land use." *Id.*

[30] *Id.* at 270. The dissenters thought the case should have been remanded to the court of appeals to review the evidence in light of *Davis*. 429 U.S. at 271-72 (Marshall, J., joined by Brennan, J., concurring in part and dissenting in part); *id.* at 272-74 (White, J., dissenting) (contending that both the statutory and constitutional issues should be remanded, with the statutory issue to be considered first). The Court's remand, 429 U.S. at 271, covered only the statutory issue—whether there had been a violation of Title VIII of the 1968 Civil Rights Act, 42 U.S.C. § 3601 *et seq.* (1976). *See* Resident Advisory Board v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (arguing the remand in *Arlington Heights* "would have been unnecessary" unless intent was not an element of Title VIII claim, since trial court had already determined no discriminatory intent present); Comment, *A Last Stand on Arlington Heights: Title VIII and the Requirement of Discriminatory Intent*, 53 N.Y.U. L. REV. 150

The *Arlington Heights* ruling effectively prevents federal judicial intervention in or supervision over local government zoning schemes, even in the most extreme exclusionary cases. Indeed, the weight of the burden imposed upon those who seek to attack such schemes and decisions under the fourteenth amendment is so great that lower federal courts can be expected to "give deference to local self-determination even when [local government] decisions have racially discriminatory impact."[31]

When other zoning decisions rendered earlier in Chief Justice Burger's tenure are reviewed, it becomes clear that *Arlington Heights* is merely a recent illustration of a strong trend toward deference to local government self-determination.[32] In *Village of Belle Terre v. Boraas*,[33] several student tenants, who were unrelated by blood or marriage, and their landlord challenged an ordinance that zoned the entire village for single-family residences, with "family" being defined to include no more than two unrelated persons living and cooking together in a single household.[34] Justice Douglas, writing for the Court, unhesitatingly rejected their claims that the ordinance violated their rights of privacy, travel, association, and equal protection.[35] In a very clear statement of deference to community self-determination, he declared that local governments have the power to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people," and to establish a "quiet place where yards are wide, people few, and motor vehicles restricted."[36] *Belle Terre* can thus be seen as having laid the foundation for *Arlington Heights*, by recognizing the authority of local governments to control the composition of their residential communities through zoning regulations.[37]

(1978) [hereinafter cited as N.Y.U. Comment]. *Cf.* Washington v. Davis, 426 U.S. 229 (1976) (distinguishing the lower burden borne by plaintiffs in Title VII actions from that in equal protection actions).

[31] McDougal, *Contemporary Authoritative Conceptions of Federalism and Exclusionary Land Use Planning: A Critique*, 21 B.C. L. REV. 301, 316 (1980) [hereinafter cited as McDougal]. *See also* Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977) [hereinafter cited as Mandelker]. State courts also generally defer to local government programmatic choices in the zoning field. *See* Macchiarola, *Local Government Home Rule and the Judiciary*, 48 J. URB. L. 335, 344-46 (1971); McDougal, *supra*, at 342; Sandalow, *supra* note 13.

[32] *See* Comment, *Standing to Challenge Exclusionary Zoning in the Federal Courts*, 17 B.C. IND. & COM. L. REV. 347, 347-49 (1976).

[33] 416 U.S. 1 (1974). Although *Belle Terre* was decided after Burger was appointed Chief Justice, its principal judicial protagonists were all leading lights of the Warren Court—Justice Douglas for the majority and Justices Brennan, *id.* at 10, and Marshall, *id.* at 12, in dissent. Justice Douglas' opinion was joined by Chief Justice Burger and Justices White, Stewart, Powell, Blackmun and Rehnquist.

[34] *Id.* at 2-3.

[35] *Id.* at 7. Indeed, he dismissed their claims almost summarily: "[The ordinance in question] involves no 'fundamental' right guaranteed by the Constitution, such as voting, . . . the right of association, . . . the right of access to the courts, . . . or any rights of privacy. . . ." *Id.* (citations omitted).

[36] *Id.* at 9.

[37] Zoning was originally upheld as a means of regulating the *uses* of land for the common good. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1920).

The Court's later ruling in *Warth v. Seldin*,[38] purportedly resting on procedural grounds, did even more than *Belle Terre* to insulate local zoning schemes from federal judicial scrutiny. In *Warth*, a broad range of plaintiffs, including several individuals who claimed to have been illegally excluded from residence there, sought to challenge the exclusionary purpose and effect of the zoning ordinance and practices of Penfield, New York (a suburb of Rochester).[39] The Court crafted a new "substantial probability" test that linked standing to the effectiveness of ultimate relief a federal court might give, and it denied standing to all plaintiffs on the ground that their complaint failed to demonstrate that they personally would benefit should a court grant the requested relief.[40] Justice Powell[41] added that the political process was the appropriate arena for resolving zoning disputes:

Belle Terre, while relying heavily upon *Euclid*, went substantially further in upholding a local government regulation upon the *users* of land. *See* Comment, *The Power to Regulate People: Moore v. City of East Cleveland*, 55 DENVER L.J. 311, 324, 327 (1978) [hereinafter cited as *Power to Regulate*]. *Arlington Heights*, in turn, rejected plaintiffs' claims that local government zoning decisions planned as regulations of land *use* were actually covert exclusions of certain land users—low and middle income residents. 429 U.S. at 269.

[38] 422 U.S. 490 (1975).

[39] *Id.* at 493-94. *See* Sager, *Insular Majorities Unabated*: Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373 (1978) [hereinafter cited as Sager]. Professor Sager's excellent commentary and critique describes the *Warth* plaintiffs as having the "symmetry and mutually supportive qualities of a troop deployment." *Id.* at 1376-77 n.9. A not-for-profit citizens' housing action group was in "the vanguard" (alleging that Penfield's zoning ordinance excluded low and moderate income persons); Rochester property owners (alleging they had to pay higher taxes to support Rochester services because lower cost housing with tax abatements remained in their city rather than in Penfield) and low and moderate income Rochester residents who were members of minority groups (alleging they had been excluded from Penfield) served as the "infantry columns;" and two builders' associations (alleging they had been prevented from constructing low- and moderate-income housing in Penfield) were on "the flanks." *Id.*

[40] 422 U.S. at 504-08. Justice Powell, writing for a five-justice majority, stated the Court's new test for standing as follows:

> [A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him* and that he personally would benefit in a tangible way from the court's intervention.

Id. at 508.

The individual plaintiffs claiming exclusion failed to meet this test, because none of them had a current property interest in Penfield, and two apparently had too little income and one had too much income to qualify for the one subsidized project that had been proposed. *Id.* at 506 & n.16. Justice Brennan's dissent sharply disagreed with the majority's reading of these income figures. *Id.* at 527 n.7 (Brennan, J., dissenting).

The Court further ruled that none of the many other plaintiffs were properly in federal court. The Rochester taxpayers had no standing, because their injury was "conjectural," the "line of causation between Penfield's actions and such injury [was] not apparent from the complaint," they asserted no "personal right . . . to be free of action by a neighboring municipality," and they could not assert the third party rights of persons allegedly excluded. *Id.* at 509-10. Similarly, the citizens' housing action group had no standing as a Rochester taxpayer or as a citizens' group to raise the constitutional rights of third parties. *Id.* at 512-14. Nor could the builders' associations assert a claim for injunctive relief based on the constitutional rights of their members (or pre-

> We also note that zoning laws and their provisions, long considered essential for urban planning, are peculiarly within the province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws should not overlook the availability of the normal political process.[42]

Warth's standing requirement creates an almost insurmountable barrier to systemic attacks upon exclusionary zoning schemes.[43] It permits standing only for plaintiffs who attack an unfavorable zoning or rezoning decision with respect to a particular project, such as the attack made in *Arlington Heights*.[44]

---

sumably those of their potential purchasers) unless a specific proposed project had been precluded by defendants' actions. *Id.* at 516. Though one of the members of one of the builders' associations had previously been denied a zoning variance for a specific, moderate-income project in Penfield, the Court ruled that any dispute over this project had been moot by the time the complaint was filed. *Id.* at 517.

[41] Justice Powell's opinion was joined by Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist. These same five justices were in the majority in both *Belle Terre* and *Arlington Heights*. They also composed the five-man majority in San Antonio Ind. School District v. Rodriguez, 411 U.S. 1 (1973), and Milliken v. Bradley, 418 U.S. 717 (1974), see notes 47-72 *infra* and accompanying text.

Justice Brennan dissented in an opinion joined by Justices White and Marshall. 422 U.S. at 519. He argued that the low-income minority plaintiffs and the two builders' associations had standing. He concluded, "These parties, if their allegations are proved, certainly have the requisite personal stake in the outcome of *this* controversy, and the Court's conclusion otherwise is only a conclusion that *this* controversy may not be litigated in a federal court." *Id.* at 530 (Brennan, J., dissenting) (emphasis in original).

[42] *Id.* at 508 n.18. Justice Douglas, in dissent, also recognized that questions of community self-determination, which he likened to those in *Belle Terre*, were involved:

> A clean, safe and well-heated home is not enough for some people. Some want to live where the neighbors are congenial and have social and political outlooks similar to their own. This problem of sharing areas of the community is akin to that when one wants to control the kind of person who shares his own abode.

422 U.S. at 518 (Douglas, J., dissenting). Yet, his next sentence showed he was prepared to define the "community" more broadly than the majority had. As he viewed the facts, "Metro-Act of Rochester, Inc. [the citizens' action group] and the Housing Council in the Monroe County Area, Inc. . . . represent the communal feeling of the actual residents . . . . Their protest against the creation of this segregated community expresses the desire of their members to live in a desegregated community." *Id.* For this reason, he felt they should be given standing, as were the plaintiffs in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), see note 217 *infra* and accompanying text, and that the other plaintiffs should be given standing "by virtue of the dignity of their claim." *Id.* at 519. He concluded, "The zoning power is claimed to have been used here to foist an un-American community model on the people of this area. I would let the case go to trial and have all the facts brought out." *Id.* He thus rejected the most extreme exclusionary implications of his *Belle Terre* opinion, see notes 33-37 *supra* and accompanying text.

[43] Sager, *supra* note 39, at 1383. *See also* Lamb & Lustig, *supra* note 27, at 207-22. *But see* Sandalow, *Comment on* Warth v. Seldin, 27 LAND USE L. & ZONING DIGEST, No. IX, at 7 (1975).

[44] *But cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), in which Justice Powell was prepared to be much more generous with respect to standing in a suit challenging the admission requirements of a state educational institution. His attempt to distinguish his *Warth* opinion is particularly instructive. *See id.* at 280 n.4.

As already noted, however, the *Arlington Heights* "discriminatory intent" standard imposes a nearly unbearable burden of proof upon plaintiffs attempting to overturn local government self-determination decisions in federal courts. In short, *Warth, Belle Terre*, and *Arlington Heights* have largely ended federal court review of local government[45] decisions concerning the character of land use in local communities.[46]

2. Local Finance and Education

The Court has extended similar deference to local government financing arrangements. In *San Antonio Independent School District v. Rodriguez*,[47] residents of school districts with below average property values and per capita incomes challenged the school financing scheme in Texas as a deprivation of equal protection.[48] Like most school systems at that time, Texas schools were financed primarily by local real estate taxes, with the result that districts with higher property values were able to spend substantially more on education than poorer districts, even when the latter imposed a higher tax rate.[49] Although state aid, which was distributed partially on the basis of relative taxing ability, tended to reduce the difference, there was still a wide variation among districts in dollars spent per student.[50]

The Supreme Court, per Justice Powell, ruled that this school financing scheme should not be subjected to strict judicial scrutiny by federal courts because it did not discriminate against "any definable category of 'poor' people" and did not result in "absolute deprivation of education."[51] Indeed,

---

[45] The Burger Court has also retreated from reviewing zoning decisions made directly by local citizens. *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). *See also* James v. Valtierra, 402 U.S. 137 (1971). Both cases are discussed at greater length in notes 84-101 *infra* and accompanying text.

[46] The Court has, however, been willing to enforce congressional statutes imposing additional duties upon local governments or expanding the scope of judicial review of local land use decisions. See notes 200-61 *infra* and accompanying text.

[47] 411 U.S. 1 (1973).

[48] *Id.* at 46.

[49] *See id.* at 11-16. Thus, even though the Edgewood Independent School District, "situated in the core-city . . . in a residential neighborhood that has little commercial or industrial property," *id.* at 12, made a greater effort by imposing a tax rate of 1.05 per cent, this produced only $26 per student per year above its contribution to the Foundation Program. In contrast, the Alamo Heights Independent School District, an affluent residential community, imposed a lower tax rate, only .85 per cent, yet produced $333 per student per year because of its much higher property values. *Id.* at 12-13.

For a discussion of developments in other states, see MANDELKER & NETSCH, *supra* note 113, at 784-91, 816-28, and sources cited therein.

[50] Edgewood Independent School District spent $356 per student per year, while Alamo Heights spent $594 per student per year. 411 U.S. at 12-13.

[51] *Id.* at 25. The Court described the plaintiffs as a "large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less wealth than other districts," *id.* at 28, and it found no factual basis for a conclusion that the "poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts," *id.* at 23. Professor Coons offers the following refutation of the court's conclusion:

> Wealth is the capacity to purchase a specific good; here that good is education. . . . One buys public education only with public money; he is

since the Texas scheme was "affirmative and reformatory," the majority felt it "should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."[52] More specifically, Justice Powell's opinion emphasized that judicial intervention was inappropriate given the Court's lack of expertise, knowledge, or familiarity with such sensitive and technical matters as state and local taxation and educational policy.[53] He then found a rational relationship between Texas' locally based financing system and a legitimate state interest in preserving local control over education. Strongly endorsing community self-determination, Justice Powell noted that the Texas scheme

> permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. . . .
>
> . . . .
>
> [Even the poorest districts] will retain under the present system a large measure of authority as to how available funds will be allocated . . . [and] the power to make numerous other decisions with respect to the operation of the schools. The people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.[54]

> education-poor in the public market if his school district is poor. In the case of public education, personal wealth and district wealth are *identical*, because the only wealth a family has available for the purchase of public education is that of the school district. . . . So far as proof of the constitutional violation is concerned, it is proper literally to identify district poverty with personal poverty.

Coons, *Recent Trends in Science Fiction: Serrano Among the People of Number*, 6 J.L. & ED. 23, 38 (1977) (emphasis in original). Professor Tribe argues that neither a definable class nor absolute deprivation were required by prior wealth discrimination cases. *See* TRIBE, *supra* note 26, at 1124.

The lack of absolute deprivation served as a basis for the Court's rejection of the claim that the Texas scheme denied plaintiffs a fundamental interest–education. While the Court acknowledged that education was a key service provided by state and local governments, it concluded that funding which provided "each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process" was sufficient. 411 U.S. at 37. The dissents, by contrast, made the service-provider role of state and local governments the central focus of their attack. See notes 262-321 *infra* and accompanying text.

Justice Powell's opinion was joined by Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist. Justice White dissented in an opinion joined by Justices Douglas and Brennan. 411 U.S. at 63. Justice Marshall dissented in an opinion joined by Justice Douglas. *Id.* at 70.

[52] 411 U.S. at 39.

[53] *Id.* at 40-43.

[54] *Id.* at 49, 51-53. The Court added that a contrary decision might open the judicial floodgates, resulting in the drowning of self-determination:

The Court then added a "cautionary postscript" that the "unprecedented upheaval in public education" which a contrary result would produce might not result in a benefit for "the poor, racial minorities, or the children in overburdened core-city school districts" represented by plaintiffs.[55] For all of these reasons, Justice Powell concluded that "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[56]

Justice White's dissenting opinion accepted community self-determination, in the form of "maximizing local initiative and choice" in education, as a legitimate state purpose. Nevertheless, he found the facts simply did not support the majority's conclusion that the Texas scheme furthered this goal.[57] Justice Marshall's dissent took a very different tack. Rather than seeing it as a self-rule case, he, like the plaintiffs, focused on school districts as service-providers.[58] This approach led him to the conclusion that Texas' locally-based financing scheme prevented the poorest districts from delivering a constitutionally adequate level of educational service.[59] After attacking the

---

> Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions.

Id. at 54. This comment may also signal the Court's concern that a contrary ruling would have required it to examine the mathematical details of financing schemes in nearly every state, just as the Warren Court had been bogged down with reapportionment cases for so many years. See notes 112-15 & 197-98 *infra* and accompanying text. For a collection of cases and commentaries vividly portraying the frustrations of those state courts, especially New Jersey, which entered this school financing thicket, see MANDELKER & NETSCH, *supra* note 13, at 784-828.

[55] 411 U.S. at 56. In a later opinion, Warth v. Seldin, 422 U.S. 490 (1975), Justice Powell developed this same skepticism about the effectiveness of federal court rulings into a doctrinal ground for denying plaintiffs standing in their broad-based attack upon a town's zoning scheme. See notes 38-44 *supra* and accompanying text.

[56] 411 U.S. at 59.

[57] *Id.* at 63, 68 (White, J., dissenting).

[58] *Id.* at 70 (Marshall, J., dissenting). Justice Marshall's emphasis on the results of the local political process, rather than on any value inherent in the process itself was evident in his very first sentence:

> The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside.

Id. at 70-71. In the next paragraph, he added:

> In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination.

Id. at 71.

[59] *Id.* at 132-33.

majority's rejection of the strict scrutiny test,[60] he criticized its analysis of and deference to fiscal self-rule. Like Justice White, he noted that the state already controlled many details of this local service.[61] Moreover, he insisted that the claim for fiscal self-determination be linked to the fiscal preconditions for effective citizen participation:

> If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in every district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district—a factor over which local voters can exercise no control.[62]

Thus, Justice Marshall found the majority's deference to local self-rule highly inappropriate; he would, instead, have required the Texas school system to fulfill its service-provider role more equitably.

The lines of conflict between deference to self-rule and insistence on the obligations of service-providers were drawn even more starkly in a later case that, at least nominally, dealt with procedural issues. In *Milliken v. Bradley*,[63] Chief Justice Burger was joined by the other four members of the *Rodriguez* majority in ruling that a federal district court had exceeded its authority by granting an injunction that consolidated and restructured school district lines in a three-county metropolitan area outside Detroit, where Detroit alone had been found guilty of racial segregation in violation of the equal protection clause.[64] . Despite a finding by the courts below that "any less comprehensive a solution than a metropolitan area plan would result in an all black system immediately surrounded by practically all white suburban school systems,"[65]

---

[60] *Id.* at 97-98. Justice Marshall argued that plaintiffs constituted a recognizable class for purposes of equal protection analysis ("the children of a district are disadvantaged if that district has less taxable property per pupil than the state average," *id.* at 96) and advocated a sliding scale of judicial review rather than the strict two-tier approach employed by the majority. *Id.* at 98-110.

[61] *Id.* at 126-27. Justice Marshall gave the following summary of state involvement:

> In Texas, statewide laws regulate in fact the most minute details of local public education. For example, the State prescribes required courses. All textbooks must be submitted for state approval, and only approved textbooks may be used. The State has established the qualifications necessary for teaching in Texas public schools and the procedures for obtaining certification. The State has even legislated on the length of the school day.

Id. (footnotes omitted).

[62] *Id.* at 127-28. *See* TRIBE, *supra* note 26, at 1131 ("[I]nsofar as local control is a concomitant of local rather than centralized funding, the Texas system afforded local control only to the property-rich districts.").

[63] 418 U.S. 717 (1974).

[64] *Id.* at 752-53. Justices Blackmun, Powell, and Rehnquist joined Chief Justice Burger's opinion. Justice Stewart concurred in a separate opinion. *Id.* at 753.

[65] Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973) (summarizing the district court's findings), *rev'd*, 418 U.S. 717 (1974).

the majority declared, "to approve the remedy ordered . . . would impose on the [53] outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy."[66] The Court ruled that school district lines cannot be "casually ignored or treated as a mere administrative convenience," because these lines separate independent governmental authorities responsible for the operation of autonomous school systems.[67] Citing *Rodriguez*, it added, "No single tradition in public education is more deeply rooted than *local control over the operation of schools*."[68]

Justice White, joined by the other three *Rodriguez* dissenters,[69] argued that under the majority's community self-determination approach, "the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local districts."[70] Justice Marshall, as he had in *Rodriguez*, emphasized the extensive degree of centralized state control over education.[71]

Thus, the prevailing five justices saw *Rodriguez* and *Milliken* as self-determination cases in which it was inappropriate for the federal courts to interfere with local educational policymaking, which local educational authorities used as a means of defining the character of their communities. *Rodriguez*, in addition, involved the delicacy and difficulty of restructuring state and local revenue-raising systems. The majority justices in both cases clung to their view of local governments as institutions for self-rule, despite suggestions from the four dissenters that this vision did not conform to the fiscal and

---

[66] 418 U.S. at 745.

[67] *Id.* at 741. Desegregation plans that apply throughout a large city school district, but do not cross district lines, subsequently obtained the approval of a clear majority of the Court. In Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), Justices Blackmun and Stevens joined the three remaining *Milliken* dissenters (Justices White, Brennan and Marshall) in upholding such a plan for the entire Columbus School District, based upon the district court's finding "that at the time of trial there was systemwide segregation in the Columbus schools that was the result of recent and remote intentionally segregative actions by the Columbus Board." *Id.* at 463-64. Even Chief Justice Burger, *id.* at 468, and Justice Stewart, *id.* at 469, concurred. In the companion case, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), the same five-justice majority upheld a court of appeals ruling that a systemwide remedy was required where a dual school system had existed in 1954 and the school board had failed to fulfill its duty to disestablish that system and its effects. This time, however, Chief Justice Burger and Justice Stewart dissented, concluding that the district court's finding that plaintiff had failed to prove the necessary connection between remote purposeful segregative actions and current segregation effects was not clearly erroneous. 443 U.S. at 478-79. Justices Powell and Rehnquist dissented in both *Penick* and *Brinkman*, opposing judicial intrusions upon local control over education. *Id.* at 479, 489, 542.

[68] 418 U.S. at 741-42 (emphasis added).

[69] *Id.* at 762 (White, J., dissenting, joined by Douglas, Brennan, and Marshall, JJ.).

[70] *Id.* at 763.

[71] *Id.* at 793-98 (Marshall, J., dissenting, joined by Douglas, Brennan, and White, JJ.). See note 61 *supra* and accompanying text.

administrative realities of the cases before them. The dissenters, by contrast, saw education as a state service being delivered poorly and inequitably.[72]

3. Abuse of the Self-Determination Principle

The Burger Court's conception of self-determination as requiring local government policymaking and financial arrangements to be free of federal court intervention found an extreme application in *Rizzo v. Goode*.[73] There, in an opinion authored by Justice Rehnquist, the Court ruled that a federal district court had exceeded its equitable powers when it required the Philadelphia Police Department to create a "comprehensive program for dealing adequately with civilian complaints," even though the district court had found a "pattern of frequent police violations" of constitutional rights and a departmental policy that discouraged citizen complaints.[74] The Supreme Court majority held that the named plaintiffs in this class action lacked standing to sue. Although they had been subjected to police mistreatment in the past, the majority concluded that the named plaintiffs lacked the requisite personal stake in the outcome, because they might not be subjected to such treatment in the future.[75]

---

[72] Professor Tribe uses somewhat different terminology to describe the *Milliken* opinions:

> The 5-4 split in Milliken reflects a fundamental disagreement among the Justices concerning the purpose of school desegregation. . . . For the majority, which defined right and remedy on the basis of the jurisdictional impact of the wrong, state action which contributed directly or vicariously to the de jure segregation of Detroit schools imposed on the state only the obligation to effect desegregation within the Detroit district. However, for the dissenting Justices, who defined right and remedy in terms of outcomes, the existence of discriminatory state action, direct or vicarious, imposed on the state an affirmative obligation to exercise all of its authority, including its authority to redraw school district boundaries if necessary, in a manner which facilitated desegregation in fact.

TRIBE, *supra* note 26, at 1038-39 n.5.

[73] 423 U.S. 362 (1976).

[74] Council of Orgs. on Philadelphia Police Accountability & Responsibility v. Rizzo, 357 F. Supp. 1289, 1318-31 (E.D. Pa. 1973), *aff'd in part, vacated and remanded in part sub nom.* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976). The trial court had ruled that the more drastic, interventionist remedy sought by one group of plaintiffs—placing the police department in receivership—was not necessary. Instead, it required defendants to formulate a detailed program for handling citizen complaints in accordance with its guidelines, which included revision of police manuals and rules of procedure. *See* 357 F. Supp. at 1320-21. "The proposed program, negotiated between petitioners and respondents for the purpose of complying with the order, was incorporated six months later into a final judgment." 423 U.S. at 365.

[75] 423 U.S. at 372-73. Justice Rehnquist opined that plaintiffs' claimed injury "rests not upon what the named petitioners [city officials] might do to them in the future . . . but upon what one of a small, unnamed minority of policemen might do to them in the future because of [those] unknown [policemen's] perception of departmental disciplinary procedures." *Id.* at 372. Characterizing this claim as "even more attenuated than those allegations of future injury found insufficient in *O'Shea* to warrant invocation of federal jurisdiction," *id.*, the Court concluded that the named plaintiffs did not present a "case or controversy." *Id.* at 373. O'Shea v. Littleton, 414 U.S. 488 (1974), was a class action attack on the allegedly discriminatory bond-setting,

Despite its conclusion that no case or controversy existed, the *Rizzo* Court went on to rule that federal judicial interference with internal police department procedures was, in any event, inappropriate.[76] It concluded that there were too few incidents of police brutality to justify the new complaint procedures and that the failure of high-level local officials to supervise patrolmen could not justify broad judicial relief affecting the entire police department. The majority further opined that this intervention in delicate local government policy matters violated principles of federalism.[77] Justice Rehnquist even went so far as to analogize *Rizzo* to inapt Burger Court decisions restricting federal court interference with prior state *judicial* proceedings.[78]

---

sentencing, and jury-fee assessment practices of a county judge and magistrate. The Court ruled the threatened injury was "too remote" to present a justiciable controversy, because the *O'Shea* plaintiffs could only be subjected to the allegedly unconstitutional practices if they violated a valid law and were then validly arrested. *Id.* at 498. Justice Blackmun's dissent in *Rizzo* distinguished *O'Shea* on the ground that the *Rizzo* plaintiffs were " 'persons' injured by past unconstitutional conduct (an allegation not made in the *O'Shea* complaint) and fear injury at the hands of the police regardless of whether they have violated a valid law." 423 U.S. at 383.

Justice Rehnquist's opinion was joined by Chief Justice Burger and Justices White, Stewart, and Powell. Justice Blackmun's dissent was joined by Justices Brennan and Marshall.

[76] 423 U.S. at 373-80.

[77] *Id.* at 375-76, 380. Apparently, police supervisory officials were sued because: (1) municipalities could not, at that time, be sued directly under 42 U.S.C. § 1983, see notes 181-91 *infra* and accompanying text, and (2) a broadly worded injunction against individual policemen would involve too great an intermeddling by the federal court with daily police affairs. *See* 423 U.S. at 381, 386-87 (Blackmun, J., dissenting); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 239-40 n.11 (1976) [hereinafter cited as *1975 Term*]. For a post-*Rizzo* order prohibiting more specific police misconduct where supervisory officials were directly involved, see P.A.B., Inc. v. Stack, 440 F. Supp. 937 (S.D. Fla. 1977) (the author served as co-counsel for plaintiffs). An excellent discussion of the difficulties of formulating "the elaborate affirmative decree" involving the operation of a state or a local government agency appears in Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 40-41 (1978). *See also* Chaynes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1296-1302 (1976).

[78] 423 U.S. at 378-80. The first such abstention case was Younger v. Harris, 401 U.S. 37 (1971), in which the Court announced that equity, comity, and federalism prevent federal injunctions against pending state criminal proceedings, in the absence of bad faith prosecution or other extraordinary circumstances. *Id.* at 53. The *Younger* abstention principle has been extended by the Burger Court to include state-initiated civil proceedings, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (Rehnquist, J.), and state criminal actions commenced before "proceedings of substance on the merits" have taken place in a prior federal injunctive suit, Hicks v. Miranda, 422 U.S. 332 (1975) (White, J.). *See also* Moore v. Sims, 442 U.S. 415 (1979) (Rehnquist, J.) (*Younger* absention appropriate where pending state custody proceedings raised similar issues); Trainor v. Hernandez, 431 U.S. 434 (1977) (White, J.) (abstention from interference with state-initiated proceeding to recover welfare payments and accompanying garnishment action); Juidice v. Vail, 430 U.S. 327, 335-36 (1977) (Rehnquist, J.) ("[W]e think the salient fact is that federal court interference with the State contempt process is 'an offense to the State interest,' " whether contempt be labeled civil, quasi-criminal, or criminal). *See generally* Comment, *Closing the Courthouse Door: The Expanding Rationale of Younger Abstention*, 19 B.C. L. REV. 699 (1978).

In *Rizzo* the Court strayed far from the *Belle Terre* and *Rodriguez* conception of self-determination as a means for local communities to determine their character without outside interference.[79] *Rizzo* does, nevertheless, have many of the same practical effects as some of the community self-determination cases. Like *Warth*, it requires a judicial focus on individual cases of unconstitutional conduct—rezoning particular parcels or discrete instances of police brutality.[80] Like *Milliken*, it shows antipathy for broad structural federal injunctions.[81] Like *Arlington Heights*, it creates a substantive test that requires plaintiffs to delve into the discriminatory motives of public officials, rather than permitting them to rely upon the effects of official conduct, to prove constitutional violations.[82] Yet, unlike these opinions, *Rizzo* is not linked to the democratic concerns which are the driving spirit behind community self-determination. Instead, the emphasis in *Rizzo* is upon federal court respect for the integrity of local government institutional structures as an end in itself.[83] As the next section shows, this institutional emphasis reflects an inadequate conception of the self-rule role of local government.

B. *Citizen Participation vs. Community Self-Determination: The Actors Should Respond*

Arguments for deference to community self-determination are most effective when linked to the other aspect of self-rule—citizen participation. In other words, the claim for local political independence from outside control is strongest when the local government can demonstrate that its actions, in fact, reflect the will of its citizens, who have participated in formulating the policies

---

The Court has, however, noted that the *Younger* principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding." Steffel v. Thompson, 415 U.S. 452, 462 (1974). *See* Wooley v. Maynard, 430 U.S. 705 (1977) (Burger, C.J.); Allee v. Medrano, 416 U.S. 802, 814 (1974); Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 509 (1972). Indeed, the analogy to *Younger* abstention seems particularly inappropriate in the *Rizzo* context. When a federal court abstains under *Younger* and its progeny, it is merely requiring the federal plaintiff to attempt to vindicate his or her federal rights as a defendant in an ongoing criminal, quasi-criminal or state-initiated civil proceeding, thereby allowing valid prior state court action to continue and avoiding duplication of judicial effort. The *Rizzo* plaintiffs, on the other hand, were complaining that the existing processes—citizen complaint procedures—for vindicating their individual rights against their local government were fundamentally unfair. *Rizzo* actually encouraged judicial duplication by forcing them to file and reprove their federal constitutional case in state court. *See* TRIBE, *supra* note 26, at 156; *1975 Term*, *supra* note 77, at 244-46.

[79] See notes 33-37 & 47-62 *supra* and accompanying text.

[80] See notes 38-44 *supra* and accompanying text.

[81] See notes 63-72 *supra* and accompanying text. At least in *Milliken* the district court had found that there was no racial discrimination by suburban school districts, while in *Rizzo* there was a showing of inadequate supervision by the defendant officials subjected to the trial court's injunction.

[82] See notes 21-31 *supra* and accompanying text.

[83] *Cf.* Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 1 (1978) (arguing that judicial interference with labor unions, churches, and families is disruptive of important, internal institutional relationships).

behind those actions. Local citizen participation may develop in a variety of ways, ranging from voting for representatives to direct involvement in policymaking as a local official. The Burger Court has shown a strong preference for decisionmaking by direct local citizen participation in referenda, but it apparently sees little role for the federal courts in assuring that other, less direct, avenues of participation remain open to all members of the community.

1. Referenda

Not surprisingly, the Burger Court has found no constitutional violation when the outcomes of local referenda override the policy determinations of elected local representatives, even where these referenda outcomes have severe exclusionary effects. The first such case considered by the Burger Court was *James v. Valtierra*,[84] announced in 1971. There, a five-justice majority[85] rejected an equal protection attack on a California constitutional provision requiring all "low-rent housing project[s]" developed by a state or local government agency to be "approved by a majority of those voting at a community election."[86] The Court emphasized that the provision in question did not involve an explicit racial classification,[87] and it rejected plaintiffs-appellees' argument that strict judicial scrutiny should be applied because of the additional political burden the referendum requirement imposed on the poor.[88] Citing California's long history of employing local referenda on a variety of subjects,[89] the Court concluded that mandatory public housing referenda merely reflected the state's "devotion to democracy, not to bias, discrimination, or prejudice."[90] In a statement clearly linking self-determination, citizen participation, and local fiscal decisionmaking, the Court concluded:

> This procedure ensures that all people of a community will have a voice in a decision which may lead to large expenditures of local government funds for increased public services and to lower tax rev-

---

[84] 402 U.S. 137 (1971).

[85] *Id.* Justice Black's opinion for the Court was joined by Chief Justice Burger and Justices Harlan, Stewart, and White. Justice Marshall's dissenting opinion was joined by Justices Brennan and Blackmun. *Id.* at 143. Justice Douglas did not participate.

[86] 402 U.S. at 139; CAL. CONST. art. XXXIV, § 1.

[87] 402 U.S. at 141, 143. This allowed the Court to distinguish Hunter v. Erickson, 393 U.S. 385 (1969), which invalidated a city charter provision requiring "that any ordinance regulating real estate on the basis of race, color, religion or national origin could not take effect without approval by a majority of those voting in a city election." *See* 402 U.S. at 140.

[88] *Id.* at 141. This ruling in *James* that only an explicit racial classification, and not discriminatory impact, would trigger strict judicial scrutiny was a harbinger of later Burger Court opinions—*Rodriguez*, *Davis*, and *Arlington Heights*. See notes 21-31 & 47-62 *supra* and accompanying text.

[89] 402 U.S. at 142. The Court neglected to note that the other mandatory referenda—involving the issuance of general obligation bonds and municipal annexation—did not single out low-income persons to bear their burden. Moreover, other forms of public housing were not subject to prior approval by referenda. *See* 402 U.S. at 143, 144 (Marshall, J., dissenting).

[90] 402 U.S. at 141.

> enues. It gives them a voice in decisions that will affect the future development of their own community.[91]

Five years later, the Burger Court relied upon *James* to justify a referendum procedure with even more severe exclusionary implications. In *City of Eastlake v. Forest City Enterprises, Inc.*,[92] the Court[93] upheld a city charter provision that required all proposed zoning changes accepted by the city council to be approved by 55 percent of those voting in a local referendum.[94] The challenged provision had been added to the Eastlake City Charter by voter initiative after the City Planning Commission and the elected Eastlake City Council had approved a zoning change to permit plaintiff Forest City Enterprises, a real estate developer, to construct a multi-family, high-rise apartment building.[95] The United States Supreme Court reversed the ruling of the Ohio Supreme Court that this referendum requirement was an unconstitutional delegation of power which deprived plaintiff of due process of law.[96]

Chief Justice Burger's opinion initially described the important role of direct local citizen participation:

> A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. . . . In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.[97]

He continued by noting that the referendum, like the Massachusetts town meeting, is a means "for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies."[98] Since zoning and rezoning decisions were characterized as "legisla-

---

[91] *Id.* at 143.

[92] 426 U.S. 668 (1976). Eastlake, Ohio is a suburb of Cleveland.

[93] The voting breakdown in *Eastlake* was somewhat different from the cases discussed above. See note 41 *supra*. This time, Justices Marshall and White joined Chief Justice Burger's opinion (along with Justices Stewart, Blackmun, and Rehnquist), but Justice Powell dissented. *Id.* at 669. Justice Stevens also dissented, in an opinion joined by Justice Brennan. *Id.*

[94] *See* EASTLAKE CITY CHARTER art. VIII, § 3, *quoted in* 426 U.S. at 670-71 n.1.

[95] 426 U.S. at 670.

[96] *See* Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 198, 324 N.E.2d 740, 747 (1975). The Ohio court ruled that due process "requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government." *Id.* at 196, 324 N.E.2d at 746.

[97] 426 U.S. at 672 (citation omitted).

[98] *Id.* at 673. Chief Justice Burger then added that referenda were "designed to 'give citizens a voice on questions of public policy.' " *Id.*, *quoting* James v. Valtierra, 402 U.S. 137, 141 (1971). This and later quotations from *James* were somewhat inapt, since the referendum considered in *James* involved low-cost public housing which may have imposed a financial drain on local taxpayers, while the mandatory referendum procedure reviewed in *City of Eastlake* applied to *all* zoning changes whether for public or private development.

tive," the Court ruled that they could be performed by means of referenda.[99] Chief Justice Burger then distinguished prior cases that had invalidated property-owner consent provisions[100] on the ground that the Eastlake referendum procedure allowed "*all the people* of a community,"[101] rather than just those living in the affected neighborhood, to participate in a zoning-change decision.

Though both opinions can be criticized for defining the relevant community or the appropriate subjects for referenda too narrowly, *James* and *City of Eastlake* are, in some sense, quintessential self-rule decisions because they link judicial deference toward community self-determination directly to citizen participation. Yet, the Court has not always insisted on such a close connection. For example, in *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*,[102] it upheld a dual majority requirement for charter revision referenda. It thus allowed a strained version of self-determination—maintaining local government structural integrity—to outweigh citizen participation. Moreover, the Court had previously held that the protection of certain citizens' financial interests could justify insulating some local decisions from direct democracy, either by requiring a supermajority vote in tax and bond referenda[103] or by restricting the referendum franchise to "primarily interested" individual and corporate landowners, whose votes were weighted according to acreage owned.[104] Despite its commitment to referenda, therefore, the Burger Court has been prepared to defer broadly to state and local governments in their choice of referendum subjects and, to some extent, even in their definition of the referendum electorate.

---

[99] *Id.* at 672. This characterization drew strong fire from Justice Stevens, who insisted that the Court, in ruling on the due process claim, was not bound by the Ohio Supreme Court's conclusion on this issue. 426 U.S. at 680, 686 (Stevens, J., dissenting); *see also* 426 U.S. at 680 (Powell, J., dissenting); Lamb & Lustig, *supra* note 27, at 188-89. Professor Sager argues that rezoning is a special kind of legislative decision—one which requires "decision by a deliberative governmental body." Sager, *supra* note 39, at 1421-22.

[100] *See* 426 U.S. at 677-78.

[101] *Id.* at 678, *quoting* James v. Valtierra, 402 U.S. 137, 143 (1971). Not only is the referendum requirement in *James* generally distinguishable from that in *Eastlake*, see note 98 *supra*, but this particular passage, see text at note 91 *supra*, is especially inapt, since it speaks of participation in decisions that may lead to "large expenditures of local government funds"—an issue that certainly was not before the Eastlake citizens when they voted.

[102] 430 U.S. 259 (1977). All justices, except Chief Justice Burger (who concurred in the judgment), joined Justice Stewart's opinion for the Court. *See generally* Martin, *The Requirement of Concurrent Majorities in a Charter Referendum: The Supreme Court's Retreat from Voting Equity*, 16 DUQUESNE L. REV. 167 (1977-78).

[103] Gordon v. Lance, 403 U.S. 1 (1971) (Burger, C.J.).

[104] Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 744 (1973). This per curiam opinion followed the reasoning of its companion case, Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), which is discussed at notes 120-26 *infra* and accompanying text. Justice Douglas, joined by Justices Brennan and Marshall, dissented in both *Associated Enterprises* and *Salyer* on the ground that these voting schemes gave disproportionate control over important government functions to discrete, wealthy elements of the local community. 410 U.S. at 735, 745.

2. Public Employment

A similar pattern of Court deference has developed with respect to the restrictions on public employment imposed by state and local governments, even though public employment provides a means of directly influencing public policy across a broad range of issues. Thus, in *Ambach v. Norwick,*[105] the Court found a basis in democratic theory for denying resident aliens access to public employment. In *Ambach*, two resident aliens, who were eligible for U.S. citizenship but had chosen not to apply, challenged a New York State statute making citizenship by birth or naturalization a prerequisite to certification as a primary or secondary public school teacher.[106] Acknowledging that the Court's alienage cases "have not formed an unwavering line,"[107] Justice Powell's opinion for the Court held that this alien-exclusion law did not violate the equal protection clause under the "rational basis standard."[108] The Court justified use of this deferential standard by ruling that teaching in public schools, like serving on a police force,[109] involved a "governmental func-

---

[105] 441 U.S. 68 (1979).

[106] Both the statute and its implementing regulations made an exception for persons who had declared an intention to become citizens but were unable to effectuate it for "valid statutory reasons," such as an oversubscribed quota. 441 U.S. at 70 nn.1-2. *See* Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1536-37 (1979) (arguing these provisions provided justification for deferential judicial review, because aliens seeking teaching jobs could avoid exclusion by declaring intent to become citizens) [hereinafter cited as Harvard Note].

[107] 441 U.S. at 72.

[108] *Id.* at 80. Justice Powell's opinion was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. These same five justices composed the *Rizzo* majority. See note 75 *supra*. Justice Blackmun dissented, 441 U.S. at 81, as he had in *Rizzo*. His opinion was joined by Justices Brennan and Marshall, who had joined his *Rizzo* dissent, and by Justice Stevens, who had not participated in *Rizzo*. The dissenters contended that the facts could not be distinguished from those of In re Griffiths, 413 U.S. 717 (1973), which had invalidated citizenship requirements for attorneys, who were officers of the court. Justice Powell responded:

> New York's citizenship requirement is limited to a governmental function because it applies only to teachers employed by and acting as agents of the State. The Connecticut statute held unconstitutional in *In re Griffiths,* 413 U.S. 717 (1973), by contrast, applied to all attorneys, most of whom do not work for the government.

441 U.S. at 76 n.6.

[109] The *Ambach* Court relied heavily upon Foley v. Connelie, 435 U.S. 291 (1978), in which the Court had upheld a statute excluding aliens from the New York State police force, because there was "some rational relationship between the interest sought to be protected and the limiting classification." *Id.* at 296. Since the police function fulfilled "a most fundamental obligation of government to its constituency" and cloaked its officers with substantial discretionary powers, *id.* at 297, the *Foley* Court ruled that the strict judicial scrutiny applied to statutes excluding aliens from all positions in the state civil service, Sugarman v. Dougall, 413 U.S. 634 (1973), or from the practice of law, In re Griffiths, 413 U.S. 717 (1973), did not apply. *Cf.* Washington v. Davis, 426 U.S. 229 (1976) (District of Columbia had legitimate interest in increasing literacy of police force when it imposed written tests with disproportionate impact upon black applicants); Rizzo v. Goode, 423 U.S. 362 (1976) (principles of federalism limited federal court's power to grant injunction requiring municipal police forces to establish formal, internal procedures to handle citizen complaints of police brutality).

tion" that was "so bound up with the operation of the State . . . as to permit the exclusion . . . of all persons who have not become part of the process of self-government."[110] Justice Powell buttressed this position by noting that citizenship "denotes an association with the polity which, in a democratic republic, exercises the powers of governance. . . . It is because of this special significance of citizenship that governmental entities, while exercising the functions of government, have wider latitude in limiting the participation of non-citizens."[111]

3. Election of Representatives

It is much more difficult, however, to discern a justification in democratic theory for Court deference to state and local government policies that dilute the value of the votes of local *citizens*. Yet the Burger Court has indicated its willingness to tolerate much more substantial deviations from mathematical precision in the one-person-one-vote standard[112] for state and local elections than for congressional elections.[113] Moreover, it has ruled that still further

---

For criticisms of *Foley*, see Harvard Note, *supra* note 106, at 1532-34; Note, 11 CONN. L. REV. 75 (1978).

[110] 441 U.S. at 73-74. The majority further emphasized the importance of public schools as a political and social "assimilative force," the wide discretion given teachers in selecting materials and methods of presentation, and the significance of the teacher "as a role model." *Id.* at 75-79. The last factor appears to be the controlling one, since it is the sole characteristic distinguishing the position of public school teacher from the policymaking position of community school board member, which apparently can be held by any resident alien who has a child in the New York City school district. N.Y. EDUC. LAW § 2590-c.4 (McKinney Supp. 1979). *See* 441 U.S. at 81-82 n.15; *id.* at 81, 86-87 (Blackmun, J., dissenting).

[111] 441 U.S. at 75 (footnote and citation omitted). The position taken by the majority in *Ambach* is consistent with dicta in Foley v. Connelie, 435 U.S. 291, 296, 299 (1978), which suggested the Burger Court would apply deferential review to statutes excluding aliens from other forms of political participation—voting, running for office, and serving on juries. See note 109 *supra* and accompanying text. *See also* Rubio v. Superior Court, 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979) (upholding exclusion of aliens from jury service). It is also, however, consistent with more recent cases involving broad deference to local governments when acting as employers. For example, in N.Y.C. Transit Authority v. Beazer, 440 U.S. 568 (1979) (Stevens, J.), the Court rejected an equal protection attack upon a local authority's ban on hiring persons in a methadone maintenance program for any of its positions, and in Bishop v. Wood, 426 U.S. 341 (1976) (Stevens, J.), it severely limited the due process protections previously available to state and local employees. *See also* Rizzo v. Goode, 423 U.S. 362 (1976); Washington v. Davis, 426 U.S. 299 (1976).

[112] Reynolds v. Sims, 377 U.S. 533 (1964), and its companion cases made this the prevailing test for legislative apportionment. The one-person-one-vote standard was later extended to local government elections. *See* Hadley v. Junior College District, 397 U.S. 50 (1970); Kramer v. Union Free School District, 395 U.S. 621 (1969); Avery v. Midland County, 390 U.S. 474 (1968).

[113] *Compare* White v. Weiser, 412 U.S. 783, 790-93 (1973) (rejecting total deviation of 2.43% from absolute population equality in congressional districting scheme) *with* Gaffney v. Cummings, 412 U.S. 735, 745 (1973) (validating 7.83% total deviation in state house of representatives election districts, because "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the fourteenth amendment so as to

variations can be justified by attempts of lawmakers to follow the boundary lines of political subdivisions in constructing election districts.[114] The acceptance of some deviation may merely reflect the Court's desire to remove itself from constant fine-tuning of state and local election districts,[115] and the acceptance of local government boundaries for election districts may reflect a desire to limit gerrymandering[116] and to maintain consistent local community representation in state[117] and county[118] legislative halls.[119]

Neither prudential nor theoretical concerns, however, can justify decisions validating laws that exclude large numbers of citizens from voting for local government boards which have a substantial impact upon community life. In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[120] the Court rejected an equal protection attack on a California scheme that excluded residents who did not own land from the election of local water district directors. The scheme also weighted the votes of all landowners—including corporations—according to the value of the land they owned. Distinguishing prior one-person-one-vote cases,[121] Justice Rehnquist's opinion for the

require justification by the State.") *and* White v. Regester, 412 U.S. 755, 763-64 (1973) (9.9% deviation for state legislative districts need not be justified). Mahan v. Howell, 410 U.S. 315, 321-24 (1973), traced this distinction between congressional and state legislative districting to Reynolds v. Sims, 377 U.S. 533, 578 (1964). It should be noted, however, that at least three current members of the Court favor applying the relaxed *Mahan*, *White* and *Gaffney* approach to congressional districting as well. *See* White v. Weiser, 412 U.S. at 798 (Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.).

[114] *See* Mahan v. Howell, 410 U.S. 315, 321 (1973) (finding a 16.4% total deviation justifiable). *See also* Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973) (" 'oddly shaped' town lines" may be followed even if this results in districts that are neither compact nor attractive).

Mr. Justice Powell, who did not participate in *Mahan*, later indicated that deviations of as much as 19.39 percent could be justified by a policy of maintaining political subdivision boundaries, even where this policy is implemented by a federal court. *See* Connor v. Finch, 431 U.S. 407, 430-31 (1977) (Powell, J., dissenting).

[115] As Mr. Justice White recently put it: "That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." Gaffney v. Cummings, 412 U.S. 735, 749-50 (1973).

[116] *See* Connor v. Finch, 431 U.S. 407, 426, 429-30 (1977) (Blackmun, J., concurring, joined by Burger, C.J.); Wells v. Rockefeller, 394 U.S. 542, 553-55 (1969) (White, J., dissenting).

[117] *See* Mahan v. Howell, 410 U.S. 315, 321-24, 325 (1973) (Rehnquist, J.).

[118] *See* Abate v. Mundt, 403 U.S. 182, 187 (1971) (deviations of up to 11.9% in county election districts jusitifed by goal of preserving boundary lines of towns which had strong cooperative relationship with county).

[119] Preserving local government boundaries has, so far, been rejected as a justification for deviations from absolute equality in congressional election districts. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 533-34 (1969); White v. Weiser, 412 U.S. 783, 790-91 (1973). See also note 113 *supra*.

[120] 410 U.S. 719 (1973). The companion case, Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973) (per curiam), upheld the establishment of a similar watershed district on the basis of a referendum with a similarly restricted franchise. See note 104 *supra*.

[121] See note 112 *supra*.

Court[122] concluded that this franchise-exclusion was constitutionally acceptable because of the water district's "special limited purpose and disproportionate" benefits for and burdens on landowners.[123] As Justice Douglas' stinging dissent[124] demonstrated, however, California water districts possessed the full panoply of governmental powers with respect to water storage, irrigation, and flood control—functions which vitally affected the lives, homes, and jobs of local residents who were not landowners.[125] Given the prevalence of special districts in metropolitan areas,[126] *Salyer's* authorization of restricted-franchise special districts seriously undermines public participation.

More recently, the Court assumed a deferential stance even in the context of a more broad-based attack on racial discrimination in a local voting scheme. In *City of Mobile v. Bolden*,[127] black citizens of Mobile, Alabama instituted a class action against the city and its incumbent commissioners, contend-

---

[122] 410 U.S. 719. Justice Rehnquist's opinion was joined by Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell. *Id.* at 720.

[123] *Id.* at 725-30. He also argued that this special voting arrangement may have been necessary to obtain the landowners' consent, so they could be assured their property would not have to bear unreasonable assessments to finance the district's operations. This argument is flawed in two respects: (1) the landowner's real protection against unreasonable burdens is the state judicial requirement that special assessments be directly related to benefits obtained, and (2) if one-person-one-vote were applied to the initial election, the landowners would, presumably, be unable to prevent the creation of a district strongly desired by the community residents.

[124] 410 U.S. at 735. Justice Douglas' dissent was joined by Justices Brennan and Marshall.

[125] As Justice Douglas noted:

> Water storage districts in California are classifed as irrigation, reclamation, or drainage districts. Such state agencies "are considered exclusively governmental," and their property is "held only for governmental purpose," not in the "proprietary sense." They are a "public entity," just as "any other political subdivision." That is made explicit in various ways. The Water Code of California states that "[a]ll waters and water rights" of the State "within the district are given, dedicated, and set apart for the uses and purposes of the district." Directors of the district are "public officers of the state." The District possesses the power of eminent domain. Its works may not be taxed. It carries a governmental immunity against suit. A district has powers that relate to irrigation, storage of water, drainage, flood control, and generation of hydroelectric energy.

Id. at 740 (footnotes omitted). He had particularly strong objections to admitting corporations to the franchise, which he found "grotesque" and "unthinkable." *Id.* at 741. He added:

> It would be a radical and revolutionary step to take, as it would change our whole concept of the franchise. California takes part of that step here by allowing corporations to vote in these water district matters that entail performance of vital governmental functions. One corporation can outvote 77 individuals in this district. Four corporations can exercise these governmental powers as they choose, leaving every individual inhabitant with a weak, ineffective voice. The result is a corporate political kingdom undreamed of by those who wrote our Constitution.

Id. at 742 (footnote omitted).

[126] *See generally* MANDELKER & NETSCH, *supra* note 13, at 38-44, 126.

[127] 100 S. Ct. 1490 (1980).

ing that its at-large election system diluted the vote of blacks (who constituted thirty-five percent of the population), in violation of section 2 of the Voting Rights Act,[128] the fifteenth amendment,[129] and the equal protection clause. In his opinion for a plurality of the Court, Justice Stewart[130] announced that absent a "purposefully discriminatory denial or abridgement by government of the freedom to vote,"[131] there could be neither a fifteenth amendment nor a statutory violation.[132] He reasoned that the fifteenth amendment "'does not confer the right of suffrage upon anyone.'"[133] Instead, he found its command to be "negative," protecting against governmental discrimination in the exercise of the elective franchise.[134] Since blacks were not prevented from registering and voting in Mobile, Justice Stewart concluded that there was no fifteenth amendment violation.[135]

Drawing upon *Washington v. Davis* and *Arlington Heights*, the Court further insisted that discriminatory intent had to be shown to establish an equal protection violation in the voting context.[136] The Court then ruled that this standard was not satisfied even by plaintiffs' showing that Alabama had a substantial history of official racial discrimination, that Commission members discriminated against blacks in municipal employment and the provision of

---

[128] 42 U.S.C. § 1973 (1976).

[129] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

[130] Justice Stewart's plurality opinion was joined by Chief Justice Burger and Justices Powell and Rehnquist. The Court reversed the Fifth Circuit Court of Appeals, which had upheld the ruling of the district court that the at-large electoral system violated plaintiffs' constitutional rights, and the latter's order that the City of Mobile adopt a mayor-council form of government with single member districts. Justice Blackmun concurred in the result, 100 S. Ct. at 1507, and Justice Stevens filed a separate opinion concurring in the judgment. *Id.* at 1508. Justices White, Brennan, and Marshall each filed a dissenting opinion. *Id.* at 1514, 1520.

[131] *Id.* at 1499. Justice Stewart found support for "the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment claim," *id.* at 1497, in Gomillion v. Lightfoot, 364 U.S. 339 (1960) (racially motivated gerrymander of municipal boundaries violated fifteenth amendment) and Wright v. Rockefeller, 376 U.S. 52 (1964) (upholding congressional reapportionment statute due to plaintiffs' failure to prove discriminatory state purpose). He also pointed to the Burger Court's reading of *Gomillion* in its *Davis* and *Arlington Heights* opinions. 100 S. Ct. at 1497 n.10.

[132] 100 S. Ct. at 1497. Neither the district court nor the court of appeals had addressed the statutory claim, although general principles of judicial administration required them to do so. The Supreme Court first considered the statutory claim, instead of remanding it, as was done in *Arlington Heights*. See note 30 *supra*. The Court concluded, however, that section 2 of the Voting Rights Act merely restated the fifteenth amendment and thus added nothing to plaintiffs' constitutional claims. 100 S. Ct. at 1497.

[133] *Id.* at 1497, *quoting* United States v. Reese, 92 U.S. 214, 217 (1875).

[134] 100 S. Ct. at 1497.

[135] *Id.* at 1499.

[136] *Id.* at 1499-1500. See notes 21-31 *supra* and accompanying text. The Court also relied upon Burger Court reapportionment cases: White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Wright v. Rockefeller, 376 U.S. 52 (1964). For further discussion of these cases, see notes 113 & 131 *supra* and accompanying text.

municipal services, that the features of the at-large electoral system tended to disadvantage blacks as a voting minority, and that no black person had ever been elected to the Commission.[137] Finally, Justice Stewart rejected the dissenters' argument for a constitutional right to effective representation with the flat statement that the "Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization."[138]

4. Abuse of the Public Participation Principle

While *James* and *Eastlake* pay homage to direct public participation in important decisions affecting the character of the community, cases such as *Salyer, City of Mobile*, and *Ambach* show a surprising deference to state and local legislation restricting the franchise, diluting votes, or limiting other forms of participation. In particular, when the goals of public participation and governmental integrity are in conflict, the Burger Court has often permitted state and local governments to choose to compromise the former in order to achieve some aspect of the latter. Deference to voting district schemes premised on local government boundaries can be viewed in this light,[139] as can deference to municipal employment policies.[140] Though the Court at least claimed to find some democratic underpinnings for these decisions, it articulated no such basis for the anti-participation ruling in *Rizzo v. Goode*. There, the Burger Court reversed a judicial order seeking to remedy constitutional deprivations through police-citizen interaction in the form of a citizen complaint procedure developed and accepted as workable by the police officials who would administer it.[141] Even more surprising is the Court's willingness to allow the compromise of citizen participation for judicial convenience[142] or for the protection of corporate property interests in *Salyer*,[143] while insisting that citizen participation values outweigh the property interests of the losing landowners and potential tenants in *James* and *Eastlake*.[144]

When read together, the cases discussed in these two subsections reveal a consistent pattern of judicial deference to local government political decisions, even where these self-determination decisions have severe exclusionary effects or undercut public participation. Thus, *Warth, Arlington Heights, James,* and

---

[137] 100 S. Ct. at 1503-04.

[138] *Id.* at 1504.

[139] See notes 114 & 119 *supra* and accompanying text.

[140] See notes 105-11 *supra* and accompanying text.

[141] See notes 73-83 *supra* and accompanying text. *See also* Ingraham v. Wright, 430 U.S. 651 (1976) (cruel and unusual punishment clause of the eighth amendment does not apply to corporal punishment in public schools; imposition of additional administrative safeguards as a constitutional requirement would intrude into domain of local school authorities); Paul v. Davis, 421 U.S. 909 (1976) (holding police chief's distribution of flyer naming plaintiff as "active shoplifter" did not deprive him of any "liberty" or "property" rights within the meaning of the due process clause of the fourteenth amendment).

[142] See note 115 *supra*.

[143] See notes 120-25 *supra* and accompanying text.

[144] See notes 84-101 *supra* and accompanying text.

Eastlake signal political officials in white, wealthy suburbs that they will be free of federal judicial interference if they exclude blacks and poor persons through various land use practices. *Milliken* and *Rodriguez* further assure them they can maintain homogeneity and local control of their schools. The general economic and racial homogeneity created by these exclusionary practices can, in turn, insulate the practices from change at the local political level. *City of Mobile* permits local officials to use at-large elections to reduce the impact of the few minority citizens who do live there, and the recent reapportionment cases[145] further ensure that these local exclusionary communities will have their own representation in the state legislature. Moreover, *Town of Lockport* entrenches the boundaries and powers of exclusionary communities by allowing their citizens to employ weighted voting in any attempted annexation or proposed modification of existing charter arrangements. Should these suburban communities need services that require a wider area for efficient operation (such as water supply or sewage disposal), they need not turn to the central city nor accept a metropolitan government. They can simply agree to the creation of special districts, with only landowners voting in the initial referendum and in any subsequent board of directors' election.[146]

C. *Limits to Deference: When Character Development Goes Too Far*

Even the broad judicial deference to local programmatic choices represented by *Arlington Heights, Belle Terre, Rodriguez, Salyer, City of Mobile*, and *Ambach* has its limits. The Burger Court has intervened when local government choices purposely impinge upon what it perceives to be fundamental interests. This is especially true where the Court can rest its decision on a constitutional basis other than the equal protection clause, where the community self-determination interest is particularly weak, or where the fundamental right is closely related to citizen participation.

1. Community Self-Determination and The Family

Moore v. City of East Cleveland[147] illustrates the limits of the Burger Court's deference to local governments in the land use field. In *Moore*, the Court invalidated a single-family zoning ordinance adopted by East Cleveland, Ohio. This criminal ordinance defined "family" so narrowly that it did not include the defendant—a grandmother living with her two grandsons, who were first cousins.[148] Justice Powell, writing for the Court, concluded that the ordinance unreasonably interfered with "family autonomy" and was not

---

[145] See notes 114 & 117-19 *supra* and accompanying text.

[146] See notes 120-25 *supra* and accompanying text.

[147] 431 U.S. 494 (1977).

[148] "Family" was defined to include no more than one married couple, their parents, and their dependent children, so long as no more than one of these children had dependent children of his or her own. *Id.* at 496 n.2. For a discussion which puts *Moore* within a line of constitutional family law cases, see Gelfand, *Authority and Autonomy: The State, The Individual and The Family*, 33 U. MIAMI L. REV. 125, 160 (1978) [hereinafter cited as *Authority and Autonomy*].

reasonably tailored to further important governmental interests.[149] It thus violated Mrs. Moore's rights as guaranteed by the due process clause of the fourteenth amendment.[150] Does *Moore* herald a trend away from the Court's "hands-off" approach to local zoning and other programmatic decisions, or is it an unusual judicial reaction reserved for "actual fits of municipal madness"?[151] To state the question more narrowly: does *Moore* signal a judicial rethinking of the *Belle Terre* rationale, or does it simply mark the outer boundary to the broad deference represented by *Belle Terre* and *Arlington Heights*?

It can, on the one hand, be argued that the right recognized in *Moore*—to reside with one's extended family free from interference by local government zoning—could logically be extended to the right to choose living companions outside the bonds of matrimony, thus undercutting the *Belle Terre* analysis.[152] Indeed, the distinction between ordinances which affect related persons, as in *Moore*, and those that affect only unrelated persons, as in *Belle Terre*,[153] begins to fade when the practical implications of the two decisions are considered. Thus, a municipality could not prevent an extended family of twenty persons from residing in the same apartment or house[154] but could prevent three[155] unrelated persons from living there.[156] Moreover, Justice Stevens' concurring opinion in *Moore* suggests a rationale—the right of "an owner to decide who may reside on . . . her property"[157]—that would also

[149] 431 U.S. at 500. Justice Powell's plurality opinion noted the historical roots of the extended family in American life and concluded that "family autonomy" was a fundamental interest. Justice Brennan, joined by Justice Marshall, concurred in an opinion which stressed the impact of the challenged ordinance upon racial and ethnic minorities. *Id.* at 508. Justice Stevens also concurred, stressing the interest of a landowner in determining how to use his or her land. *Id.* at 521.

[150] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[151] Sager, *supra* note 39, at 1421.

[152] Note the trend from Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy right of married couples to possess and use contraceptives), to Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of unmarried person to purchase contraceptives), and finally to Roe v. Wade, 410 U.S. 113 (1973) (privacy right of unwed mother to an abortion). *See also* Carey v. Population Services Int'l, 431 U.S. 678 (1976) (right of juvenile to purchase contraceptives); Stanley v. Illinois, 405 U.S. 645 (1972) (procedural due process rights of father seeking custody of his illegitimate child); 6 HOFSTRA L. REV. 1087, 1097 (1978). These cases are discussed at greater length in Gelfand, *Authority and Autonomy*, *supra* note 148, at 142-43, 160-65.

[153] See notes 33-37 *supra* and accompanying text.

[154] This assumes that there is sufficient habitable floor space for 20 persons, since *Moore* appears to recognize the validity of neutral density requirements. *See* 431 U.S. at 500 n.7.

[155] A zoning ordinance forbidding two unmarried persons to occupy the same household may have been beyond the scope of *Belle Terre* even before *Moore*. *See* O'Grady v. Town of North Castle, 73 Civ. 4571 (S.D.N.Y. Jan. 16, 1975) (relying in part upon footnote 6 in *Belle Terre* to deny motion to dismiss an action challenging ordinance that restricted town residence to families "living as a single housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bonds").

[156] *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshall, J., dissenting).

[157] 431 U.S. at 520 (Stevens, J., concurring). *Cf.* Young v. American Mini Theaters, 427 U.S. 50 (1970) (Stevens, J.) (ruling that this right can be severely re-

seem to undercut the *Belle Terre* holding, since the landlord was a plaintiff in the latter case.

On the other hand, *Moore* and *Belle Terre*, though producing opposite outcomes from the perspective of the two local governments involved, can be seen as fully consistent with the general principle of promoting "family values" through local government legislation. In this view, "*Moore* is really a corollary to the *Belle Terre* holding: zoning to protect the family and 'family values' is permissible, but zoning which interferes with the family in any way must be stricken."[158]

Employing the terminology introduced in Section I, one might argue further that *Moore* does not fully contradict the self-rule rationale of *Belle Terre*. Local governments can continue to use zoning as a means of furthering the social preferences of their citizens (community self-determination), but they may not do so in a manner which undercuts the most localized form of participation. As one commentator has observed:

> Proponents of federalism and localism argue that governmental decisions should be made by the institutions likely to be most responsive to the people affected and in which people can participate most fully. The family and comparable institutions are, of course, far closer to their members than even the smallest unit of local government. Thus, the underlying logic of the Court's federalism decisions suggests that institutions like the family should be protected even against state and local governments. Moreover, the Court has particularly stressed the role of states and municipalities in providing certain essential services—education, law enforcement, fire protection, sanitation and public health. This suggests that the Court's concern is to protect small-scale institutions so that they can provide the important services and perform the essential functions for which they are best suited. By analogy, then, the Court should protect against municipal interference with institutions, like the family, which best fulfill the vital functions of child-rearing and which serve to shelter their members against hardship.[159]

This argument, which combines aspects of the community self-determination, citizen participation, and service-provider principles, certainly suggests a viable reconciliation of *Belle Terre* and *Moore*. It leaves the latter as a fairly unique land use case. Closer judicial scrutiny of ordinances overtly[160] restricting the users of property does, however, remain possible.[161] Moreover, local

---

stricted if the particular use of the property, although presumptively protected by the first amendment, may lead to declining values for adjoining property). See note 173 *infra* and accompanying text.

[158] *Power to Regulate*, *supra* note 37, at 324-35.

[159] *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1573-74 (1978) [hereinafter cited as *Zoning*]. *See also* Gelfand, *Authority and Autonomy*, *supra* note 148.

[160] Covert restrictions upon users of property, such as those considered in *Arlington Heights*, however, will likely continue to receive the Court's sanction.

[161] *See* Group House of Port Washington, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

regulatory schemes resting on a basis other than the zoning power and trenching upon fundamental rights may face strong judicial opposition.

2. Community Self-Determination, Citizen Participation, and the First Amendment

In particular, interests protected by the first amendment have tended to limit the deference paid by the Burger Court to local government decision-making. In *Village of Schaumburg v. Citizens for a Better Environment,*[162] a non-profit, environmental protection organization challenged a Village ordinance that required charitable organizations to obtain a permit to make door-to-door or on-street solicitations of contributions. The ordinance forbade the issuance of such a permit to any organization using less than 75 percent of its funds "directly for the charitable purpose of the organization."[163] Since "charitable purpose" was defined so as to exclude solicitation costs, salaries, and administrative expenses, public advocacy organizations (like plaintiff) were necessarily excluded from solicitation in the Village.[164] The Court concluded that these advocacy-oriented groups, unlike traditional charity organizations or commercial operations, combined their financial solicitations with activities protected by the first amendment—"information dissemination, discussion, and advocacy of public issues."[165] Since the ordinance directly and substantially limited these forms of public participation, the Court required the Village to show that the ordinance served a "sufficiently strong, subordinating" and legitimate governmental interest.[166] Though prevention of fraud and protec-

---

[162] 100 S. Ct. 826 (1980). Justice White's opinion for the Court was joined by the Chief Justice and Justices Brennan, Stewart, Marshall, Blackmun, Powell, and Stevens. Justice Rehnquist was the sole dissenter. *Id.* at 837.

[163] SCHAUMBURG VILLAGE CODE § 22-20(g), *quoted in* 100 S. Ct. at 829. "Satisfactory proof" of compliance with the 75 per cent requirement was to be made on the basis of a " 'certified audit of the last full year of operations' " or " 'other comparable evidence.' " *Id.* at 829 n.4.

[164] 100 S. Ct. at 835. Plaintiff, in moving for summary judgment, had submitted affidavits testifying that it spent 23.3 per cent of its income on fundraising in both 1975 and 1976, as well as 21.5 per cent in 1975 and 16.5 per cent in 1976 on administration. *Id.* at 830-31.

[165] *Id.* at 835, *quoting* Village of Schaumburg v. Citizens for a Better Environment, 590 F.2d 220, 225 (7th Cir. 1978). Justice White connected his analysis, at least implicitly, with the importance of citizen participation by noting

> that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and . . . that without solicitation the flow of such information and advocacy would likely cease.

100 S. Ct. at 834. He also concluded that charitable solicitation was not a variety of purely commercial speech, because it "does more than inform private economic decisions." *Id.* For this reason, the Court held that plaintiff could challenge the facial validity of the ordinance on overbreadth grounds by a summary judgment motion. *Id.* That is, the "normal rule" against assertion of third party rights, as articulated so fully in *Warth*, was inapplicable, as were later Burger Court opinions, such as Bates v. State Bar of Arizona, 433 U.S. 350, 363 (1977), which had held that the overbreadth doctrine could not be invoked in the context of "commercial speech." *See* 100 S. Ct. at 835.

[166] 100 S. Ct. at 836.

tion of residential privacy—an aspect of community self-determination—were considered substantial local government interests, they were "only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests."[167]

Justice White's *Village of Schaumburg* opinion actually involved slightly closer judicial scrutiny than was employed by the Chief Justice in an earlier analogous case, *Hynes v. Mayor and Council of the Borough of Oradell*.[168] In the latter case, the Court invalidated a town ordinance regulating door-to-door canvassing and solicitation for charitable and political purposes on vagueness grounds. *Hynes*, even more starkly than *Village of Schaumburg*, appeared to pose the conflict between community self-determination and citizen participation. The plaintiffs were a state assemblyman, Hynes, who was campaigning for re-election in the town, and registered voters residing there, who sought to participate in political campaign canvassing. The preamble of the challenged ordinance, in turn, clearly stated a community self-determination purpose:

> WHEREAS, the Borough of Oradell is primarily a one family residential town whose citizens are employed elsewhere, resulting in the wives [sic] of the wage earner being left alone during the day; and WHEREAS, because of the geographical location of most of the homes it is impossible to police all areas at the same time, resulting in a number of break[ing] and entries and larcen[ies] in the home; . . . .[169]

The Court struck down the ordinance on vagueness grounds, but suggested that a more narrowly drawn identification ordinance might succeed.[170] Chief

---

[167] *Id.* The Court observed that more precisely drawn regulations could be employed to prevent fraud, that "householders are equally disturbed by solicitation on behalf of organizations satisfying the 75-percent requirement as they are by solicitation on behalf of other organizations," *id.*, and that the ordinance was not restricted to residential solicitation but applied to on-street solicitation as well. *Id.*

[168] 425 U.S. 610 (1976). Chief Justice Burger's opinion for the Court was joined by Justices Stewart, White, Blackmun, and Powell. Justice Brennan concurred in part, in an opinion joined by Justice Marshall. *Id.* at 623. Justice Rehnquist dissented. *Id.* at 630. Justice Stevens took no part in the decision.

[169] Oradell Ordinance No. 598A, *quoted in* 425 U.S. at 613 n.2.

[170] *See* 425 U.S. at 617. According to Burger, the defects of the ordinance which rendered it unconstitutionally vague were:

> First, the coverage of the ordinance is unclear; it does not explain, for example, whether a "*recognized* charitable cause" means one recognized by the Internal Revenue Service as tax exempt, one recognized by some community agency, or one approved by some municipal official. While it is fairly clear what the phrase "political campaign" comprehends, it is not clear what is meant by a "Federal, State, County or Municipal . . . *cause*." Finally, it is not clear what groups fall into the class of "Borough Civic Groups and Organizations" that the ordinance also covers.
>
> Second, the ordinance does not sufficiently specify what those within its reach must do in order to comply. The citizen is informed that before soliciting he must notify the Police Department, in writing, "for identification only." But he is not told what must be set forth in the notice, or what the police will consider sufficient as "identification." . . . Nor does the ordinance "provide explicit standards for those who apply" it.

Justice Burger's opinion for the majority thereby avoided the explicit articulation of the conflict between self-determination and citizen participation, which was confronted more directly in Justice Brennan's *Hynes* concurrence[171] and in Justice White's later opinion for the Court in *Village of Schaumburg*.[172]

Yet, neither *Hynes* nor *Village of Schaumburg* should be read as signaling a substantial exception to the Burger Court's broad deference to local ordinances regulating community affairs.[173] These two decisions merely protect the door-to-door residential dissemination of explicitly political speech from

---

Id. at 621-22 (emphasis in original) (footnote omitted). The Court further ruled that the limiting construction given the ordinance by the New Jersey Supreme Court, 66 N.J. at 380, 331 A.2d at 279, did not remedy these flaws. *See* 425 U.S. at 622.

[171] Justice Brennan, while recognizing the important interests of municipalities in "keeping neighborhoods safe and peaceful," contended that "door-to-door solicitation and canvassing [was] a method of communication essential to the preservation of our free society." 425 U.S. 610, 624 (Brennan, J., concurring). The identification requests of the Oradell Ordinance, by destroying anonymity, "'. . . might deter perfectly peaceful discussion of public matters of importance' . . . particularly . . . of sensitive and controversial issues," *id.* at 625, as well as discourage citizen participation in political campaigning, so significant "to the preservation and strength of the democratic ideal." *Id.* at 628.

[172] *Village of Schaumburg*, in striking a more specific statute challenged by a less traditional political group, seemed to represent slightly more judicial intervention by the Court than did the majority opinion in *Hynes*.

[173] In general, the Burger Court has upheld first amendment attacks upon community self-determination ordinances and laws. *See, e.g.*, First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (Powell, J.) (5-4 ruling) (state criminal statute forbidding banks and business corporations to make contributions for purposes of influencing vote on referendum proposals concerning questions not materially affecting the bank or corporation held to violate first amendment); National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) (state supreme court's denial of stay of lower court's order enjoining National Socialist Party of America from parading in uniform or displaying swastika, or from distributing or displaying materials promoting hatred against Jews or others of any faith, ancestry or race, held to violate first amendment in absence of procedural safeguards); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (8-0 ruling) (invalidating municipal ordinance banning posting of real estate "for sale" signs, in order to promote stable, integrated neighborhoods); Elrod v. Burns, 427 U.S. 347 (1976) (5-3 ruling) (practice of patronage dismissals of non-civil service, non-policymaking employees of county sheriff's office held to violate first amendment); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (Powell, J.) (6-3) (municipal ordinance making it a public nuisance for drive-in movie theater to exhibit films containing nudity, when screen visible from a public street, held impermissible prior restraint); Lewis v. New Orleans, 415 U.S. 130 (1974) (Brennan, J.) (5-3) (municipal ordinance making it unlawful to use "obscene or opprobrious language" toward police officer held to violate first amendment); Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (unanimous in result) (city ordinance prohibiting all picketing within 150 feet of school, except peaceful picketing of school involved in labor dispute, held to violate first and fourteenth amendments); Coates v. Cincinnati, 402 U.S. 611 (1971) (Stewart, J.) (5-3) (municipal ordinance making it unlawful for three or more persons to assemble on sidewalks and conduct themselves in "manner annoying to persons passing by," held to violate first and fourteenth amendments); *cf.* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (7-0 ruling) (city vagrancy ordinance held unduly vague because it failed to give fair notice of forbidden conduct, encouraged arbitrary police action and made normally innocent behavior criminal). *But see* Elrod v. Burns, 427 U.S. 347 (1976) (Powell, J., dissenting) (self-rule principles support patronage).

some forms of regulation. The Court's earlier opinion in *Young v. American Mini Theatres, Inc.*[174] makes it clear that localities may prevent other forms of protected speech from "settling" in residential areas in the form of "adult" businesses. Thus, the Court has continued to defer broadly to local zoning regulations, while showing a willingness to scrutinize other regulations that have an adverse impact on first amendment public participation interests.

3. Community Self-Determination and Municipal Creditworthiness

The broadest reading of *San Antonio Independent School District v. Rodriguez*[175]—that local financing arrangements are to be regulated exclusively by state and local legislation without federal judicial intereference—has been narrowed somewhat by the Court. In *U.S. Trust v. New Jersey*,[176] a holder and trustee of revenue bonds issued by the Port Authority of New York and New Jersey challenged a 1974 New Jersey statute that sought to repeal retroactively a 1962 statutory covenant that had limited the power of the Port Authority to subsidize mass transit operations from its reserves and revenues, which were derived from bridge fees, tunnel tolls, and building rents.[177] Jus-

---

One area in which the Burger Court has fairly consistently rejected first amendment claims, however, is obscenity. *See* Miller v. California, 413 U.S. 15 (1973) (5-4) (state criminal statute designed to regulate obscene material not violative of first amendment where material covered by statute appeals to prurient interest in sex, portrays sexual conduct specifically defined by state law and has no serious literary, artistic, political or scientific value); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (5-4) (state law regulating commerce in obscene material and the exhibition of such in public places, including "adult" theatres, does not violate first amendment, even though conclusive proof of nexus between anti-social behavior and obscene material is lacking). *See also* Young v. American Mini Theaters, 427 U.S. 50 (1976) (rejecting first amendment attack on zoning dispersion law applied to businesses dealing in "adult" materials not yet proven to be obscene). Furthermore, the Court has been willing to defer broadly, on the basis of community self-determination, to factual conclusions by the legislature about obscenity which may be incorrect. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 & n.8 (1973). *See generally* Gelfand, *Authority and Autonomy*, *supra* note 148, at 146-47.

[174] 427 U.S. 50 (1976). Justice Stevens' opinion for the Court was joined by Chief Justice Burger and Justices White and Rehnquist. Justice Powell also joined in Parts I and III, but filed a separate concurring opinion in which he disagreed with the Court's analysis of the first amendment issue. *Id.* at 73. Justice Stewart filed a dissenting opinion joined by Justices Brennan, Marshall, and Blackmun, *id.* at 84, and Justice Backmun's dissenting opinion was joined by Justices Brennan, Stewart and Marshall, *id.* at 88.

The Detroit ordinance upheld by the *Young* Court required the geographic dispersion of adult bookstores and cinemas. The ordinance was intended to preserve residential neighborhoods, reduce crime, and prevent decreases in property values. All three purposes are life-style interests promoted by local government in its self-rule capacity, *see* 427 U.S. at 80 (Powell, J., concurring), but the third interest also affects the service-provider role, since decreased property values will result in lower property tax revenues.

[175] 411 U.S. 1 (1973). See notes 47-62 *supra* and accompanying text.

[176] 431 U.S. 1 (1977).

[177] *Id.* at 5-7. Revenue bonds are backed solely by the revenues derived from a particular source, such as bridge and tunnel tolls, rather than by the general taxing power which stands behind general obligation bonds. *See* Gelfand, *Seeking Local Gov-*

tice Blackmun, joined by three of the seven participating Justices,[178] concluded that "the 1962 [statutory] covenant constituted a contract between the two States and the holders of the Consolidated Bonds issued" prior to 1973,[179] this contract had binding effect upon future legislatures,[180] it had been impaired by the 1974 statute,[181] and the impairment was not "reasonable and necessary to serve an important public purpose."[182] The Court, therefore, reversed the ruling of the New Jersey Supreme Court and held that the 1962 statute violated the contract clause.[183]

The *U.S. Trust* Court emphasized that it would not defer to the legislative assessment of reasonableness and necessity, "because the State's self-interest [was] at stake."[184] The statute before the Court failed to meet the necessity

---

ernment Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond, 63 MINN. L. REV. 545, 549 n.19, 560-61 (1979), and sources cited therein [hereinafter cited as *Financial Integrity*].

For a brief history of the early years of the Port Authority, see F. BIRD, A STUDY OF THE PORT OF NEW YORK AUTHORITY (1949). Much of the financial difficulties of the Port Authority were attributable to deficits created by its operation of the mass transit "tubes" linking New Jersey cities with Manhattan, *see* 431 U.S. at 9, 19, and construction of the World Trade Center, *see* Courtesy Sandwich Shop v. Port of New York Authority, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963).

[178] Justice Blackmun's opinion was joined by Chief Justice Burger, Justice Rehnquist, and Justice Stevens. 431 U.S. at 2. Chief Justice Burger also wrote a separate concurring opinion. *Id.* at 32. Justice Brennan, joined by Justices White and Marshall, dissented. *Id.* at 33. Justices Stewart and Powell took no part in the decision.

[179] *Id.* at 18. This was based upon a finding by the trial court. *See* United States Trust Co. v. State, 134 N.J. Super. 124, 183 n.38, 338 A.2d 833, 866 n.38 (1975).

[180] The Court ruled that the covenant, despite its binding effect upon future legislatures, was not invalid under the reserved powers doctrine, because it was "purely financial, and thus not necessarily a compromise of the State's [New Jersey's] reserved powers." 431 U.S. at 25.

[181] The trial court had concluded there was no impairment, since plaintiff had failed to prove the market price of the bonds had been permanently affected by the repeal of the statutory convenant. United States Trust Company v. State, 134 N.J. Super. at 181-82, 196, 338 A.2d at 866, 874 (1975). It had employed the standard set by a long line of earlier cases holding that a modification, to constitute an impairment, must materially or substantially alter the contract. *See* W.B. Worthen Co. v. Kavanagh, 295 U.S. 56 (1935); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); National Sur. Co. v. Architectural Decorating Co., 226 U.S. 276 (1912); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1867). *See generally* Hale, *The Supreme Court and the Contract Clause: III*, 57 HARV. L. REV. 852 (1944). Although Justice Blackmun claimed not to dispute the trial court's findings, he concluded that an impairment *had* resulted from the repeal of the 1962 covenant. He justified this conclusion by noting "[a]s a security provision, the covenant was not superfluous; it limited the Port Authority's deficits and thus protected the general reserve fund from depletion." 431 U.S. at 19.

[182] 431 U.S. at 25.

[183] *Id.* at 32. The Contract Clause provides: "No state shall . . . pass any . . . law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1.

[184] *Id.* at 26. *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (also treating states as if they were natural persons when acting with respect to financial matters, see notes 262-73 *infra* and accompanying text); Gladstone v. Village of

requirement because alternatives to the total repeal of the 1962 covenant existed—exclusion of proposed bridge and tunnel surcharges from the covenant, modifications of the formula for permitted mass transit deficits, and new procedures for bondholder approval.[185] Moreover, the repeal was unreasonable, because the covenanting parties had anticipated in 1962 the very circumstances which prompted repeal of the covenant in 1974—public demand for mass transit, energy shortages, and environmental problems.[186] In short, under the *U.S. Trust* standard, "necessity is established only when the state's objectives could not have been achieved through less drastic modifications of the contract; reasonableness is assessed by the extent to which alteration of the contract was prompted by circumstances unforeseen at the time of the contract's formation."[187] This stringent judicial scrutiny of the repeal legislation[188] drew severe criticism from Justice Brennan, who was joined in dissent by Justices White and Marshall.[189]

Bellwood, 441 U.S. 91 (1979) (giving village standing to sue on ground that "racial steering" would detrimentally affect its tax base and thus its revenue receipts, see notes 214-20 *infra* and accompanying text). *But see* Allied Structural Steel v. Spannus, 438 U.S. 234 (1978) (also closely scrutinizing, and invalidating, a state's modification of *private* contractual relations over the objections of the three *U.S. Trust* dissenters).

[185] 431 U.S. at 30 n.28. The Court, however, expressed no opinion on the constitutionality of any of these covenant modifications. It also noted several alternative means of furthering the state's goals, but provided no cost-benefit analysis. *Compare* Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 38-39 (1978) (arguing plaintiff attacking legislation should bear burden of producing social science data needed to show its unconstitutionality).

[186] 431 U.S. at 32. The Court stated:

> During the 12-year period between adoption of the covenant and its repeal, public perception of the importance of mass transit undoubtedly grew because of increased general concern with environmental protection and energy conservation. But these concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind. We cannot say that these changes caused the covenant to have a substantially different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in light of changed circumstances.

Id.

[187] *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 86 (1977) (footnotes omitted) [hereinafter cited as *1976 Term*]. Chief Justice Burger, in his concurring opinion, articulated an even more stringent standard of review: "[T]he State must demonstrate that the impairment was *essential* to the achievement of an important state purpose. Furthermore, the State must show that it did not know and *could not have known* the impact of the contract or that state interest at the time the contract was made." 431 U.S. at 32 (emphasis added).

[188] Indeed, Justice Blackmun's treatment of the "necessity" requirement appears more akin to first amendment analysis, *see* United States v. O'Brien, 391 U.S. 367 (1968), than to the usual level of judicial review employed for legislation regulating property rights. *See 1976 Term*, *supra* note 187, at 87-88.

[189] 431 U.S. at 53 (Brennan, J., dissenting). He argued: "The Court . . . stands the Contract Clause completely on its head . . . and both formulates and strictly applies a novel standard for reviewing a State's attempt to relieve its citizens from unduly harsh contracts entered into by earlier legislators." *Id.* He also contended that "this apparently spontaneous formulation . . . is wholly out of step with the modern attempts of this Court to define the reach of the Contract Clause when a state's own contractual obligations are placed in issue." *Id.* at 54-55. The dissent then analyzed the

4. The Narrow Parameters of the Fundamental Rights Exception

Arlington Heights, *Belle Terre*, *Rodriquez*, and *Ambach* show the Court's willingness to defer to local government decisions that define and control the "life-style" of local communities. They emphasize what has been referred to here as "community self-determination," *i.e.*, the ability of citizens, through their local governments, to determine the nature and quality of their communal life without interference by the federal courts. Although community self-determination has no specific textual support in the Constitution,[190] the Court does seem to view it as "an intrinsically valued process"[191] entitled to substantial deference and respect even when the effects upon non-residents may be quite unfavorable. Yet *Moore*, *Village of Schaumburg*, and *U.S. Trust* show that the Court will nevertheless closely scrutinize some local[192] self-determination legislation which severely infringes upon fundamental rights.[193]

Due to the Burger Court's sometimes shifting majority, it may appear difficult to predict precisely which rights will be deemed to outweigh community self-determination.[194] One can, however, isolate some common factors in the cases discussed above. The statutes and ordinances invalidated in *Moore*, *Village of Schaumburg*, and *U.S. Trust* all involved governmental action

---

deferential judicial approach toward legislative contractual modifications in Worthern Co. v. Kavanaugh, 295 U.S. 56 (1935), Faitoute Iron & Steel Co. v. Asbury Park, 316 U.S. 502 (1942), and El Paso v. Simmons, 379 U.S. 497 (1965). In particular, the dissent noted that the *Asbury Park* Court had unanimously "authorized an impairment of creditors' financial interests [extending the maturity date of municipal bonds by more than 30 years and reducing the coupon rate] that was far more substantial than that involved" in *U.S. Trust*, 431 U.S. at 57. *But see* Hurst, *Municipal Bonds and the Contract Clause: Looking Beyond United States Trust Co. v. New Jersey*, 5 HAST. L.Q. 25, 55-56 (1978) [hereinafter cited as Hurst]. The dissent was also very critical of the majority for failing to take account of facts which, it contended, showed the great weight of the State's self-rule interests and the "minimal" damage to bondholders occasioned by the repeal. *Id.* at 38, 41. *See also* Comment, *Revival of the Contract Clause*, 39 OHIO ST. L.J. 195, 206 n.92 (1978).

[190] *But cf.* Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (rejecting *Rodriguez*-type claim for state-wide school financing in part because local control was state constitutional right).

[191] Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1192 n.86 (1978) [hereinafter cited as Michelman].

[192] *U.S. Trust* involved attempted repudiation of a statutory covenant created for the benefit of holders of bonds issued by a bi-state authority. Although neither this authority nor the State of New Jersey could make as strong a claim for self-determination as the Village of Arlington Heights or the Alamo Heights Independent School District, one suspects that an attempt by either of these local governments to repudiate a covenant would receive similar treatment at the hands of the *U.S. Trust* majority. *See* E & E Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675 (7th Cir. 1980).

[193] As one commentator on *Moore* has put it, "In short, strict scrutiny would be applied only to ordinances impinging on previously enumerated fundamental rights, and these rights would be strictly construed; minimal scrutiny would be the standard for all other ordinances." *Power to Regulate*, *supra* note 37, at 320.

[194] *See generally* Ely, *The Supreme Court 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10-16 (1978) (criticizing the Burger Court's "value imposition methodology" and the legal theorists who advocate it).

purposefully and overtly directed against the groups represented by the plaintiffs—extended families, advocacy-oriented solicitors, and bondholders. Moreover, none of these three cases required the Court to make a detailed examination of the operation of the local zoning or financing process.[195] Therefore, no special competence was required, and no wholesale revision of systemwide procedures was necessary.[196] In addition, plaintiffs' claims in *Village of Schaumburg* and *U.S. Trust* rested upon more specific constitutional guarantees, with a longer judicial history, than did the equal protection claims raised in nearly all of the cases involving deference to local self-determination. Finally, *Moore* and *U.S. Trust* rejected only weak self-determination interests, and *Village of Schaumburg* upheld a citizen participation claim which outweighed the self-determination interest.[197]

III. National Actors Enter the Stage—Congressional and Federal Administrative Activity

While the Court's fundamental rights exception to deference to local self-rule has been somewhat limited where it has been called upon to act by defining or creating rights, the Burger Court has made it clear that Congress can alter both the procedural and substantive standards to be applied in cases challenging local government actions. Thus, the Court has shown a greater willingness to intervene where local government actions interfere with rights defined by Congress. The congressional enactments involved have been based upon the commerce clause,[198] the post-Civil War amendments,[199] and the spending clause.[200] The supremacy clause[201] instructs the Court that valid congressional and presidential acts, premised on these and other powers constitutionally delegated to the national government,[202] are to prevail over contrary state and local actions. The Burger Court has, however, found some federalism-based limitations on national government actions which interfere with the structural integrity of state and local governments.

A. *Expansion of Individual Rights: Congress Upstages Local Governments*

1. Proving a Violation of Individual Rights

Both the Burger Court and circuit courts have acknowledged congressional authority to expand the substantive content of individual and group

---

[195] This contrasts sharply with *Arlington Heights*, *Warth*, and *Rodriguez*.

[196] This contrasts with the reapportionment cases, see notes 112-15 *supra* and accompanying text, and with *Rodriguez*.

[197] The Court has not, however, always given this priority to citizen participation values. See notes 139-44 *supra* and accompanying text.

[198] *See* National League of Cities v. Usery, 426 U.S. 833 (1976); City of Lafayette v. Louisiana Power and Light, 435 U.S. 389 (1978).

[199] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[200] North Carolina v. Califano, 435 U.S. 962 (1978).

[201] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, Anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

[202] Other relevant powers might include the bankruptcy clause, the enforcement section of the fifteenth amendment, the taxing power, and the war power.

rights asserted against local governments acting in their self-rule capacity. Thus, even though the Court could find no equal protection violation in *Arlington Heights*,[203] because there was no showing of discriminatory purpose,[204] it remanded the case for a determination whether the Fair Housing Act[205] required the application of a broader standard of local government liability. On remand, the Court of Appeals for the Seventh Circuit ruled that the Village had an obligation under this federal statute "to refrain from zoning policies that effectively foreclose the construction of any low-cost housing within its corporate boundaries."[206] It established a four-pronged test to determine whether such a statutory violation had occurred,[207] and remanded to the district court to apply this new test.[208]

---

[203] Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); see notes 21-31 *supra* and accompanying text.

[204] 429 U.S. at 270. The Court relied on Washington v. Davis, 426 U.S. 229 (1976), which involved a challenge under the fifth amendment's due process clause to the District of Columbia's use of an unvalidated personnel test as part of its recruitment of police officers. See note 25 *supra*. In *Davis*, the Court held that different substantive standards are to be applied in such discrimination cases, depending upon whether the claim is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976), or is brought directly under the Constitution.

As to Title VII claims, the Court in *Davis* held that proof of discriminatory impact is sufficient. 426 U.S. at 246-47. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977). *But see* New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (purporting to apply "disparate impact" standard, but rejecting a Title VII attack upon Transit Authority's employment exclusion of methadone users because the rather substantial statistical showing upon which trial court's findings for plaintiffs were based was "weak"). For a general discussion of the use of statistical evidence in such cases, see Note, *The Role of Statistical Evidence in Title VII Cases*, 19 B.C. L. REV. 881 (1978).

[205] 429 U.S. at 271, *citing* Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1976). By contrast, the Court in *Davis* had ruled there was no necessity to remand on the Title VII claim, because that claim had been adequately ventilated below. The trial court had found that the challenged personnel test was directly related to performance in the police training program. 426 U.S. at 248-52.

[206] Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1285 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

[207] The factors were:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Id. at 1290.

The Seventh Circuit's application of this test still evidenced substantial respect for "local prerogatives." *Id.* at 1292-93. In describing the third prong of the test (interest of the defendant), the Court said, "[i]f the defendant is a governmental body acting within the ambit of legitimately dervied authority, we will less readily find that its action violates the Fair Housing Act. . . . Moreover, municipalities are traditionally afforded wide discretion in zoning. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)." *Id.* at 1293. Also, in applying the fourth factor (nature of relief sought), the Court showed concern for the financial implications of a ruling under the Fair Housing Act, announcing that courts should be less willing to intervene where plaintiffs seek to compel

Furthermore, in *City of Mobile v. Bolden*,[209] the Burger Court rejected fourteenth and fifteenth amendment attacks on Mobile's use of an at-large system for electing commissioners, on the ground that plaintiffs had failed to prove purposeful discrimination by the City or its commissioners. Yet, the very same day, the Court, in *City of Rome v. United States*,[210] upheld the U.S. Attorney General's authority under the Voting Rights Act of 1965[211] to reject electoral changes that would have given Rome, Georgia an at-large system comparable to that judicially validated for Mobile. In *Rome*, as in *Mobile*, there had been no showing of discriminatory purpose; the electoral modifications would, however, have had a discriminatory effect by diluting the votes of blacks in Rome. The Court, per Justice Marshall, reasoned:

> The Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purpose of the Fifteenth Amendment even if it is assumed that Section 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.[212]

The Court thus demonstrated its intent to follow Congress' lead in the expansion of individual rights against state and local governments.[213]

---

affirmative government action, such as the construction of integrated housing, than where plaintiffs seek simply to remove governmental obstacles to the construction of integrated housing on their own land. *Id.* The Seventh Circuit's test has been criticized both for insensitivity to the legitimate municipal interests in prohibiting low income housing projects, *see* N.Y.U. Comment, *supra* note 30, at 175-76, and for giving insufficient attention to the substantial national interest in ending racial discrimination in housing, *see Zoning*, *supra* note 159, at 1688-90. *See also* Mandelker, *supra* note 31, at 1252 n.108 (test requires policy and financial judgments too complex for court to make in absence of further statutory guidance).

[208] The principal factual issue was whether or not other properly zoned suitable sites were available within the Village for low cost housing. 558 F.2d at 1291, 1294-95. The court of appeals majority placed the burden of providing this issue on the defendant Village. *Id.* at 1295. After months of negotiation, the Village agreed to annex and rezone a neighboring area in which the subsidized rental housing will be built. The agreement was effectuated by a consent decree issued by the district court. Metropolitan Housing Development Corp. v. Village of Arlington Heights, Civil Action No. 72C 1453 (N.D. Ill. Apr. 2, 1979), *described in* URB. AFF. REP. (CCH), Apr. 12, 1979, at 1. The challenge to this decree by an adjoining village, various property owners, and community associations was rejected by the Court of Appeals for the Seventh Circuit. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980).

[209] 100 S. Ct. 1490 (1980). See notes 127-38 *supra* and accompanying text.

[210] 100 S. Ct. 1548 (1980). See notes 288-97 *infra* and accompanying text.

[211] 42 U.S.C. § 1973 (1976).

[212] 100 S. Ct. at 1562.

[213] Even before *Rome*, the circuit courts had shown a willingness to give a broad reading to federal civil rights statutes. *See, e.g.*, Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). Pre-*Arlington Heights* cases include Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S.

2. Standing to Sue and Immunity from Suit

In addition to this power to enlarge the substantive content of individual rights, Congress can also expand the class of plaintiffs who can pursue suits against local governments and can alter the types of defenses available. For example, the Burger Court has acquiesced in substantial statutory expansion of standing to bring housing discrimination suits. In *Gladstone v. Village of Bellwood*,[214] real estate brokerage firms and their employees were accused of "racial steering." Plaintiffs included both residents and non-residents of the "target area," as well as the Village in which the target area was located.[215]

Justice Powell's opinion for the Court[216] ruled that Congress, in the Fair Housing Act of 1968,[217] had expanded standing to the full extent of the fed-

---

1042 (1975); and Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

Some district courts had, however, extended the *Washington v. Davis* discriminatory purpose standard to employment discrimination actions under 42 U.S.C. § 1981. *See* Dickerson v. U.S. Steel Corp., 439 F. Supp. 55 (E.D. Pa. 1977); Croker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977); Johnson v. Hoffman, 424 F. Supp. 490 (E.D. Mo. 1977). A final resolution of this issue was postponed when the Supreme Court vacated as moot a Ninth Circuit ruling that a public employer's hiring practice, which was exclusionary in operation but not purposefully discriminatory, violated both Title VII and Section 1981. County of Los Angeles v. Davis, 440 U.S. 625 (1979). Justice Brennan, writing for the majority, found the controversy moot because the only employment practice the plaintiff class had standing to challenge had not been and would not be used and because the County had hired a substantial number of minority recruits during the pendency of the litigation. Two Justices were, however, anxious to reach the substantive issue. *Id.* at 1386 (Powell, J., dissenting, joined by Burger, C.J.).

Even if a discriminatory intent standard were deemed necessary for Section 1981 actions, this would not necessarily prevent the application of the discriminatory effect standard in actions under Titles VII and VIII of the 1964 Civil Rights Act. Section 1981 is a broad remedial statute with language closely paralleling the fourteenth amendment itself. The twentieth-century civil rights statutes, like the Voting Rights Act of 1965 interpreted in *Rome*, are focused upon particular discrimination problems, and their legislative histories support broad judicial interpretation within their spheres of coverage. *See* Lau v. Nichols, 414 U.S. 563, 567-68 (1974) (Title VI); Griggs v. Duke Power Co., 402 U.S. 424, 429-36 (1971) (Title VII); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289 (7th Cir. 1977) (Title VIII); Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128 (1976); *Zoning*, *supra*, note 159, at 1681-84, and sources cited therein.

[214] 441 U.S. 91 (1979).

[215] *Id.* at 93, 94, 95. Plaintiffs alleged that defendants had steered black prospective buyers toward an integrated neighborhood in the Village of Bellwood and had steered white prospective buyers away from this area. *Id.* at 95.

[216] Justice Powell's majority opinion was joined by Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun, and Stevens. Justice Rehnquist dissented in an opinion joined by Justice Stewart. *Id.* at 116.

[217] Specifically, the Court ruled that section 812 of this Act, 42 U.S.C. § 3612 (1976), which authorizes immediate federal court action by plaintiffs, provided a remedy for the same class of plaintiffs as section 810, 42 U.S.C. § 3610 (1976), which establishes procedures for administrative conciliation of housing discrimination claims before the bringing of individual suits. The Court had previously held that section 810 extended standing "as broadly as is permitted by Article III of the Constitution." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972). *Trafficante* involved an action under section 810 brought by one white and one black tenant against their

eral courts' article III powers,[218] thus permitting suits by those who would have been barred by the "prudential standing rules" he had articulated in *Warth*.[219] The Court, therefore, concluded that the trial court had erred in granting summary judgment against the target area residents and the Village, since they both had alleged economic injury due to loss of the integrated character of the target area.[220] It is likely that this expansive interpretation of standing under the Fair Housing Act and other civil rights acts will obtain where the defendant is a public institution rather than a private realtor or landlord.[221]

In a related development, for example, the Burger Court reinterpreted the Civil Rights Act of 1871 and the Sherman Antitrust Act to remove the total immunity for local governments which prior decisions had engrafted onto these statutes. In *Monell v. Department of Social Services*,[222] seven members of the current Court,[223] after a careful reexamination of the legislative history,[224] voted to overrule[225] the Warren Court's holding in *Monroe v. Pape*[226] that local governments could not be sued under the Civil Rights Act of 1871[227] for constitutional violations.[228] Yet, they continued to show defer-

---

private landlord for discriminating against non-white potential tenants in various ways. Justice Douglas wrote for a unanimous Court, with Justices White, Blackmun and Powell joining in a separate concurring opinion. He ruled that plaintiffs had standing as "aggrieved persons" to bring the action under section 810, because of the alleged loss of economic, social, and professional benefits they would have derived from living in an integrated apartment complex. *Id.* at 209.

[218] "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . [and] to Controversies . . . ." U.S. CONST. art. III, § 2, cl. 1.

[219] Warth v. Seldin, 422 U.S. 490, 501 (1975). *See id.* at 500-01 (inviting Congress to overcome these judicial prudential barriers to standing by making appropriate legislative findings of fact).

[220] 441 U.S. at 115.

[221] *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 139 n.17 (1977), *cert. denied*, 435 U.S. 908 (1978); *Zoning*, *supra* note 159, at 1664-66, 1683-86.

[222] 436 U.S. 658 (1978).

[223] Justice Brennan delivered the opinion for the Court, in which Justices White, Stewart, Marshall, and Blackmun joined. Justice Powell concurred, *id.* at 704, and Justice Stevens concurred in part, *id.* at 714. Justice Rehnquist dissented in an opinion joined by Chief Justice Burger. *Id.* at 714.

[224] *Id.* at 665-89. The interpretive problem involved what effect should be given to the congressional rejection of the Sherman amendment.

[225] *Id.* at 701.

[226] 365 U.S. 167 (1961) (Douglas, J.). *See also* Aldinger v. Howard, 427 U.S. 1 (1976) (municipal corporations cannot be sued under Section 1983 and cannot be added as pendent parties); City of Kenosha v. Bruno, 412 U.S. 509 (1973) (exemption from Section 1983 liability applies to injunctive as well as monetary relief); Moor v. County of Alameda, 411 U.S. 693 (1973) (county cannot be sued under Section 1983). Following this line of cases, lower federal courts had protected other governmental entities from suit under Section 1983. *See, e.g.*, Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977); Tron v. Condello, 427 F. Supp. 1175, 1184 (S.D.N.Y. 1976) (city teachers' retirement fund and state authorities).

[227] 42 U.S.C. § 1983 (1976). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . or Territory, subjects, or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities se-

ence to local governments, by rejecting vicarious liability suits under that statute.[229] While *Monell* gave a broad reading to Congress' power to authorize suits against local authorities,[230] it left crucial questions concerning the "contours of municipal liability"[231] and the scope of potential defenses[232] to be resolved.[233]

---

cured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This provision became law as part of the Civil Rights Act of 1871, Act of Apr. 20, 1871, ch. 22, section 1, 17 Stat. 13 (1871). The narrow question of statutory interpretation in both *Monroe* and *Monell* was whether or not local governments are "persons" within the meaning of Section 1983. If not, there could be no federal court jurisdiction under 28 U.S.C. § 1343(3) (1976), Section 1983's jurisdictional counterpart.

[228] Specifically, the Court ruled:

> Local governing bodies [and officers sued in their official capacities], therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, . . . ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . [or is taken] pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels.

436 U.S. at 690-91.

[229] The Court determined that both the language of Section 1983 ("subjects or causes to be subjected," see note 227 *supra*) and its legislative history (which implicitly rejected the usual justifications for vicarious liability) compelled the conclusion

> that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.
>
> . . . .
>
> Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 691, 694. For a criticism of the reasoning behind this conclusion, see Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMPLE L.Q. 409, 412-14 (1978) [hereinafter cited as Blum].

[230] *See especially* 436 U.S. at 690 n.54.

[231] *Id.* at 695.

[232] The principal question left unresolved, *see* 436 U.S. at 695-701 & 713-14 (Powell, J., concurring), was whether the broad immunities created by the Burger Court for various public officials, *see, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) (absolute immunity for judges); Procunier v. Navarette, 434 U.S. 555 (1978) ("good faith" defense for prison officials); Wood v. Strickland, 420 U.S. 308, 322 (1975) ("good faith" defense for school board members), would be extended to the municipalities themselves. Initially some lower courts said "yes." *See, e.g.* Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) (en banc); Ohland v. City of Montpelier, 467 F. Supp. 324, 344 (D. Vt. 1979) ("If the governmental decision-makers responsible for an unconstitutional policy or custom satisfy this good faith test, then the government, as an entity, has not acted wrongfully even if the constitutional rights of the plaintiff have been abridged."); Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978) (extending "good faith" defense to municipality "where the official acts with a purposeful intention" and setting gross negligence as the culpability standard in other *Monell*-type cases). *See generally* Blum, *supra* note 229, at 412 n.14, 441-43. Recently, however, the Supreme Court rejected this approach, ruling "that [a] municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983." Owen v. City of Independence, 100 S. Ct. 1398, 1409 (1980) (Brennan, J.). The major-

ity opinion noted that the concerns justifying qualified immunities for governmental officials were "less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue." *Id.* at 1416.

[233] Initially, the *Monell* decision was regarded as a mixed blessing by civil rights litigators. This was because other devices were already available for obtaining jurisdiction over and stating claims against municipalities, despite *Monroe*'s blockade of the Section 1983 route.

The principal device was to premise a claim directly upon the fourteenth amendment and to obtain federal jurisdiction under 28 U.S.C. § 1331(a) (1976) (general federal question jurisdiction). This approach was developed by analogy to the implication of a damage remedy for fourth amendment violations committed by federal officials. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971). It derived tacit support from the remand instructions in City of Kenosha v. Bruno, 412 U.S. 507, 514 (1973), and from Justice Brennan's concurring opinion in that case, *id.* at 516. Most lower federal courts that considered the issue prior to the Supreme Court's ruling in *Monell* had accepted this implied damage remedy. *See, e.g.*, Turpin v. Mailet, 579 F.2d 152 (2d Cir.) (en banc), *vacated and remanded* (for reconsideration in light of *Monell*), 439 U.S. 974 (1978); Owen v. City Independence, 560 F.2d 925, 933-34 (8th Cir. 1977), *remanded* (for reconsideration in light of *Monell*), 438 U.S. 902 (1978); Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977); Amen v. City of Dearborn, 532 F.2d 554, 559 (6th Cir. 1976); McDonald v. State of Illinois, 557 F.2d 596 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); Adekalu v. New York City, 431 F. Supp. 812, 818 (S.D.N.Y. 1977); Patterson v. Ramsey, 418 F. Supp. 523, 528 (D. Md. 1976); Panzarella v. Boyle, 406 F. Supp. 787, 792 (D.R.I. 1975); Sanabria v. Village of Monticello, 424 F. Supp. 402, 409 (S.D.N.Y. 1976). *But see* Kostka v. Hogg, 560 F.2d 37, 44-45 (1st Cir. 1977) (refusing to imply cause of action against municipality under fourteenth amendment in vicarious liability case but suggesting different result if municipality had directly ordered the constitutional violation); Perzanowski v. Salvio, 369 F. Supp. 223, 229-31 (D. Conn. 1974) (accepting jurisdiction under Section 1331 but refusing to imply a cause of action for damages); Sandoval v. Brown, 432 F. Supp. 1028, 1032 (D.N.M. 1977). *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U.L. REV. 770 (1975); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1459-60, 1476-68 (1975); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 952 (1976).

Eighteen months before the *Monell* opinion was delivered, the Burger Court had expressly reserved decision on the implication of such a claim for damages under the fourteenth amendment. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278-79 (1977). Justice Powell's concurring opinion in *Monell* suggests that the majority's opinion now obviates the necessity of making such a decision. 436 U.S. at 712-13. *See also* Turpin v. Mailet, 591 F.2d 426, 427 (2d Cir. 1979) (en banc); Leite v. City of Providence, 463 F. Supp. 585, 587-88 (D.R.I. 1978). *But see* Carlson v. Green, 100 S. Ct. 1468, 1477, 1478 (Burger, C.J., dissenting) (arguing the test adopted by the plurality for implying *Bivens*-type remedy under eighth amendment against federal prison officials "would seem to permit a person whose constitutional rights have been violated by a state officer to bring suit under *Bivens* even though Congress in 42 U.S.C. § 1983 has already fashioned an equally effective remedy.").

Another pre-*Monell* avenue for obtaining federal court jurisdiction, at least indirectly, over suits against municipalities was to sue the offending officials as individuals under Section 1983. *See* Edelman v. Jordan, 415 U.S. 651 (1974); Tron v. Condello, 427 F. Supp. 1175, 1185 (S.D.N.Y. 1976). Injunctive relief could nearly always be obtained this way, but monetary relief sometimes posed a problem. *See, e.g.*, Muzquiz v. City of San Antonio, 528 F.2d. 499 (5th Cir. 1976). *See generally* Freilich, Growcock, & Ungar, *1977-78 Annual Review of Local Government Law: Judicial and Constitutional Intervention in Municipal Fiscal Affairs*, 10 URB. LAW. 573, 600 (1978).

Another long-standing barrier to federal court actions against local governments was lowered when the Court, in *City of Lafayette v. Louisiana Power and Light*,[234] ruled that cities which owned and operated electric utility systems could be sued by a privately-owned utility under the Sherman Antitrust Act.[235] Justice Brennan's plurality opinion[236] concluded that local governments could invoke the "state action" defense[237] to Congress' broad antitrust scheme only when they had acted "pursuant to [a] state policy to displace competition with regulation or monopoly public service."[238] Thus, "when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws."[239] Chief Justice Burger concurred in the judgment on the ground

---

Moreover, the Supreme Court had often ruled on the merits in suits against school boards, even in some that involved monetary relief, without ever mentioning the jurisdictional issue. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. (1973); Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969). *See generally* Monell v. Dep't of Soc. Serv., 436 U.S. 658, 663 (1978); *id.* at 704, 710-11 (Powell, J., concurring).

Still other approaches included suits against municipalities under 42 U.S.C. § 1981 and under pendent state claims in a suit with jurisdiction premised upon 28 U.S.C. § 1331(a). *See* Blum, *supra* note 229, at 414-16, 419-20, and sources cited therein.

In short, *Monell* provided a new jurisdictional basis for federal suits against local governments in a limited number of circuits, but it may have cut short the gradual development or other jurisdictional bases and opened the door to an expanded arsenal of municipal defenses. *See, e.g.*, Leite v. City of Providence, 463 F. Supp. 585, 587-88 (D.R.I. 1978) (refusing to imply a claim for relief upon the fourteenth amendment and rejecting a Section 1981 claim, even though respondeat superior and negligent supervision claims were unavailing in a Section 1983 claim for verbal and physical abuse by policement). *See generally* Blum, *supra* note 229. The point is seen most clearly by noting that if the claim in *Monroe*—early morning warrantless police raiding and ransacking of plaintiff's home—were presented to a federal court after *Monell*, it could survive a jurisdictional challenge but not a motion to dismiss, because respondeat superior claims cannot be maintained under Section 1983 after *Monell*. *But see* Maine v. Thiboutot, 100 S. Ct. 2502 (1980) (ruling that § 1983 encompasses federal statutory as well as constitutional claims, that § 1983 claims can be brought in state courts, and that the latter can award attorney's fees to prevailing plaintiffs).

[234] 435 U.S. 389 (1978).

[235] 15 U.S.C. § 1 (1978). The specific violations claimed are listed in 435 U.S. at 392 n.6.

[236] Justice Brennan was joined by Justices Marshall, Powell, and Stevens. Justice Marshall wrote a separate concurring opinion, 435 U.S. at 417, and Chief Justice Burger concurred only in Part I of Justice Brennan's opinion and in the judgment, *id.* at 418. Justice Stewart wrote a dissenting opinion in which Justices White and Rehnquist joined, *id.* at 426. Justice Blackmun joined in most of Justice Stewart's dissent and wrote a separate dissenting opinion, *id.* at 441.

[237] The "state action" defense was first articulated in Parker v. Brown, 317 U.S. 341 (1943), in which the Court held that Congress did not intend the Sherman Act to apply to anti-competitive restraints imposed by state-administered programs. For recent applications, refinements, and limitations of the doctrine, see Bates v. State Bar of Arizona, 433 U.S. 350, 359-63 (1977); Cantor v. Detroit Edison, 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91 (1957). *See generally* Verkuil, *State Action, Due Process, and Antitrust*, 75 COLUM. L. REV. 328 (1975); 11 CONN. L. REV. 126, 130-36 (1978).

[238] 435 U.S. at 413.

[239] *Id.* at 416. *See id.* at 415.

that the "state action" defense did not apply to the "proprietary enterprises of municipalities," such as electric utilities, but only to "a sovereign's decision . . . to replace competition with regulation."[240] While the *City of Lafayette* Court declined to "decide any question of remedy,"[241] its decision clearly rejected the prior standard of complete immunity for municipalities based solely upon their governmental status.

3. Remedies Under Federal Statutes

The Court has also sanctioned a partial expansion of remedies against local government defendants. *Milliken v. Bradley*,[242] an equal protection case, set the standard for cases in which there has been no prior congressional or administrative intervention. As noted above, the Court there ruled that a federal district court could not consolidate white suburban and black central-city school districts to create a metropolitan-wide desegregation plan where only the Detroit central-city school system had been found guilty of direct racial discrimination.[243]

Hills v. Gautreaux[244] demonstrates how the situation can be altered when congressional legislation and federal administrative activity are involved. In *Hills*, black tenants and applicants for public housing sued the Chicago Housing Authority and the United States Department of Housing and Urban Development (HUD) on constitutional and statutory grounds.[245] The issue presented to the Supreme Court was whether a federal court order to remedy statutory and constitutional violations by HUD could extend beyond the territorial boundaries of the city in which the violations had occurred.[246] At an earlier stage of the litigation, the Court of Appeals for the Seventh Circuit had determined that HUD violated both the fifth amendment and Title VI of the 1964 Civil Rights Act[247] by knowingly funding Chicago's racially

---

[240] *Id.* at 418, 422 (Burger, C.J., concurring). Chief Justice Burger further contended, *id.* at 423, that his focus upon the activity rather than the entity providing it was closer to the spirit of the ruling in National League of Cities v. Usery, 426 U.S. 833 (1976), see notes 262-80 *infra* and accompanying text. Both the plurality opinion, 435 U.S. 412-13, and the principal dissent, *id.* at 427-28, 432-34, disagreed.

[241] 435 U.S. at 402. The dissenters contended that the Clayton Act's treble damages provision, 15 U.S.C. § 15, was mandatory and could not be disregarded by the courts. If granted, treble damages would amount to $540 million on just one of the claims in *City of Lafayette*, to be collected from cities with a combined population of only 75,000. *See* 435 U.S. at 440 (Stewart, J., dissenting); *id.* at 442-43 (Blackmun, J., dissenting). The courts may, however, find a means of engrafting a "good faith" defense for municipalities in antitrust suits analogous to that attempted by some lower courts in civil rights cases after *Monell*, see note 190 *supra*, or may require exhaustion of state remedies prior to filing in federal district court. *See* 11 CONN. L. REV. 126, 142-45.

[242] 418 U.S. 717 (1974).

[243] See notes 63-72 *supra* and accompanying text.

[244] 425 U.S. 284 (1976). The tortuous ten-year litigation history of the case is described in McGee, *Illusion and Contradiction in the Quest for a Desegregated Metropolis*, 1976 ILL. L.F. 948, 953-57, 1012-15 [hereinafter cited as McGee].

[245] 425 U.S. at 286.

[246] *Id.* at 292.

[247] 42 U.S.C. § 2000d (1970) (forbidding racial discrimination by recipients of federal financial assistance).

discriminatory public housing program.[248] It subsequently ordered the trial court to adopt "a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the city of Chicago . . . but will increase the supply of dwelling units as rapidly as possible."[249]

In reviewing this order of inter-district relief in the absence of a finding of inter-district violations,[250] the Supreme Court[251] emphasized that *Milliken* "was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities."[252] The Court then distinguished *Gautreaux* from *Milliken* on several grounds: HUD, unlike Detroit's suburban school districts, had actually violated constitutional and statutory provisions;[253] the housing market area extended well beyond Chicago's city limits;[254] HUD and the Chicago Housing Authority had power to operate throughout this metropolitan area; HUD had both the statutory power and duty to promote low-income housing opportunities and racial deconcentration.[255] After reviewing the numerous applicable federal statutes, the Court concluded that a metropolitan relief order directed against HUD "need not abrogate the role of local government units in the federal housing assistance programs."[256]

---

[248] The district court, on the basis of overwhelming uncontradicted evidence, had granted summary judgment against the Chicago Housing Authority on the ground that it had unconstitutionally selected housing sites and assigned tenants on the basis of race. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969). *See also* 425 U.S. at 288-91.

[249] Gautreaux v. Chicago Housing Authority, 503 F.2d 903, 939 (7th Cir. 1974).

[250] Although the court of appeals had surmised that an inter-district violation or segregative effect may have been present in the case, the Supreme Court criticized this as "contrary both to expert testimony in the record and the conclusions of the District Court." 425 U.S. at 294-95 n.11.

[251] Justice Stewart wrote the opinion for the Court, in which all participating Justices joined. The three remaining *Milliken* and *Rodriguez* dissenters filed a concurring opinion, written by Justice Marshall, which strongly favored "pav[ing] the way for a remedial decree directing the Department of Housing and Urban Development to utilize its full statutory power to foster housing projects in white areas of the greater Chicago metropolitan area." 425 U.S. at 307. Justice Stevens (who replaced Justice Douglas, the fourth *Rodriguez* and *Milliken* dissenter) took no part in the consideration or decision of the case.

[252] *Id.* at 293.

[253] *Id.* at 297, 299, 302.

[254] *Id.* at 299.

[255] *Id.* at 302.

[256] *Id.* at 303. This was because "[a]n order directed solely to HUD would not force unwilling localities to apply for" federal housing assistance programs. *Id.* at 303. Thus, the Court felt that merely inducing local governments to comply with housing dispersion plans by providing financial assistance was different from a federal court or agency order to comply. *Cf.* notes 298-308 *infra* and accompanying text (discussion of spending clause cases). Even as to the program in which HUD could contract directly with private builders to construct integrated and scatter-site housing, the Court noted that "local governmental units retain the right to comment on specific assistance proposals, to reject certain proposals that are inconsistent with their approved housing-assistance plans, and to require that zoning and other land-use restrictions be adhered

4. Dormant Commerce Clause Barriers to State and Local Action

In addition to its rulings in these cases involving federal civil rights and antitrust statutes, the Burger Court has fairly consistently acknowledged and protected the broad scope of Congress' private sector regulatory power, by invalidating state statutes and regulations that burden interstate commerce, even in the absence of an affirmative exercise of Congress' commerce clause power.[257] Indeed, the Court has rejected dormant commerce clause attacks on state and local actions only where the burden on interstate commerce is considered minimal[258] or where the state itself has entered the economic marketplace.[259]

---

to by builders." 425 U.S. at 305. *See* McGee, *supra* note 244, at 960-61, 1005-10. The Court thus allowed suburban governments to continue, even in cases under the 1964 Civil Rights Act, to exercise many of the self-determination powers recognized in *Arlington Heights* and *Belle Terre*, see notes 21-37 *supra* and accompanying text, and later expanded in *Eastlake*, see notes 92-101 *supra* and accompanying text.

[257] *See* Lewis v. B T Investment Managers, Inc., 100 S. Ct. 2009 (1980) (invalidating state statute forbidding out-of-state banks to own investment advisory services in the state); Hughes v. Okla., 441 U.S. 322 (1979) (striking down statute forbidding transport of minnows out of state); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (striking down statute forbidding importation of garbage for disposal in the state); Raymond Motor Transp. v. Rice, 434 U.S. 429 (1978) (striking down statute barring trucks longer than 55 feet or pulling more than one other vehicle from operating on highways within state without permit); Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333 (1977) (invalidating statute which, in effect, prohibited display of Washington State apple grades on closed containers shipped in North Carolina); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) (striking down state regulation forbidding importation of milk unless exporting state signed reciprocal trade agreement); Allenberg Cotton v. Pittman, 419 U.S. 20 (1974) (reversing state court's refusal to entertain suit on cotton delivery contract brought by unregistered, out-of-state corporation); Pike v. Bruce Church, 397 U.S. 137 (1970) (invalidating order made pursuant to state statute forbidding export of cantaloupes by grower to nearby out-of-state packers).

All of the statutes and regulations invalidated in these dormant commerce clause cases involved various forms of state business regulation. The ruling will be the same, however, even where the commerce clause interests in national uniformity and free trade are pitted directly against a community self-determination interest, such as crime control. *See* Service Mach. & Shipbuilding v. Edwards, 617 F.2d 70 (5th Cir. 1980) (dormant commerce clause violated by local ordinance requiring everyone who seeks new employment within the parish to obtain an identity card, after paying a $10.00 fee, being fingerprinted and photographed, and responding to extensive governmental questionnaire), *aff'd*, 49 U.S.L.W. 3288 (October 21, 1980). The author was lead counsel for the employers and employees challenging the ordinance in the *Service Machine* case.

[258] *See* Ray v. Atlantic Richfield, 435 U.S. 151 (1978) (rejecting dormant commerce clause attack on tug escort requirements, while finding other portions of state environmental act preempted); Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405-707 (1972) (upholding one-dollar use and service charge levied by state and local authority for each airline passenger enplaning commercial aircraft). *See also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (holding that state statute forbidding petroleum producing or refining companies to operate retail service stations did not violate dormant commerce clause, because it affected only particular interstate firms and left out-of-state independent retailers free to compete with in-state retailers).

[259] *See* Reeves, Inc. v. Stake, 100 S. Ct. 2271 (1980) (rejecting commerce clause attack on state-owned cement plant's refusal to sell to an out-of-state buyer); Hughes v.

Thus, a general pattern of Court acquiescence in congressional expansion of rights and remedies against local governments has emerged. Statutes expanding substantive individual rights against local governments (*Arlington Heights, City of Rome*), extending the class of plaintiffs who can assert these rights (*Gladstone, Trafficante*), and terminating the absolute immunity for local government defendants (*Monell, City of Lafayette*) have been upheld. In addition, the Court has enforced remedial orders under federal housing and anti-discrimination acts that impose new duties on federal agencies. Moreover, the Court has protected the broad congressional sphere of action through its dormant commerce clause rulings. While some of these cases still show solicitude for local government self-rule,[260] they do contrast sharply with the broad judicial deference of community self-determination cases, such as *Arlington Heights* and *Rodriguez*. Although the rationale for these differing results has not always been clear, it appears to rest upon the fact that the plaintiffs in *Arlington Heights, Rodriguez*, and *Salyer* were trying to persuade the Court, acting on its own, to interfere with the political decisionmaking of local, elected bodies, while their counterparts in *Gautreaux, City of Rome,* and *Monell* asked the Court merely to effectuate political decisions made by a national, elected body. In short, the latter cases involved what might be viewed as national

---

Alexandria Scrap, 426 U.S. 794, 810 (1976) (Powell, J.) (upholding state statutory scheme imposing more burdensome documentary requirements on out-of-state junk-car processors than on in-state processors, because state was "participating in the market and exercising the right to favor its own citizens over others").

Justice Brennan, joined by Justices White and Marshall, accused the majority in *Alexandria Scrap* of resting its decision on an extension of the "state sovereignty" doctrine espoused in National League of Cities v. Usery, 426 U.S. 833 (1976), see notes 262-77 *infra* and accompanying text. Hughes v. Alexandria Scrap, 426 U.S. 794, 823 n.4 (1976) (Brennan, J., dissenting). In *Reeves*, both Justice Blackmun's opinion for the five-man majority and Justice Powell's opinion for the dissenters agreed that *National League of Cities* principles could be applied in dormant commerce clause cases. The dispute was over the appropriate situation for their application. The majority contended that South Dakota's residents-first policy on cement sales was justified, because State proprietary activities are subject to congressional (affirmative commerce clause) regulation just like private business activities. *See, e.g.*, City of Lafayette v. Louisiana Power & Light, 435 U.S. 389 (1978), see notes 234-41 *supra* and accompanying text; United States v. California, 297 U.S. 175 (1946) (subjecting state-owned railroad to commerce clause-based regulations). Therefore, "[e]venhandedness suggests that, when acting as proprietors, state[s] should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." 100 S. Ct. at 2278-79. By contrast, Justice Powell (joined by Justices Brennan, White, and Stevens) concluded that state proprietary activities were subject both to dormant commerce clause attacks and to active commerce clause regulations. For these dissenters, "state sovereignty" could be a barrier only to dormant commerce clause attacks upon South Dakota's integral government operations, such as "withhold[ing] from interstate commerce the cement needed for public projects." *Id.* at 2285. "If, however, the State enters the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic balkanization." *Id.* at 2284.

[260] Some commentators believe these cases continue to show too much solicitude for local government self-rule. *See, e.g., Zoning, supra* note 159, at 1693 (criticizing *Gautreaux* for this). See also note 233 *supra* and accompanying text.

self-rule in conflict with local self-rule, with the supremacy clause[261] requiring such a conflict to be resolved in favor of the national government.

B. *Restraints on Congressional Interference with Local Government: The Constitutional Director Intervenes*

In cases where individuals seek federal judicial intervention against local governments, the Burger Court's general pattern has been deference toward the local governments, coupled with deference to congressional decisionmaking that conflicts with local decisionmaking. On the other hand, where state and local governments assert that congressional action intrudes too far upon their structural integrity, the Court has created a limited "state sovereignty" exception to the general rule of deference to Congress as a means of protecting state and local governments in their service-provider role.

1. *National League of Cities* and "State Sovereignty"

Any analysis of the limits the Burger Court has placed on congressional interference with local governments must begin with the 1975 decision in *National League of Cities v. Usery*.[262] There, the Court, with Justice Rehnquist writing for a four-man plurality,[263] invalidated amendments to the Fair Labor Standards Act which extended minimum-wage and maximum-hour protections to state and municipal employees.[264] The plurality reasoned that although Congress had the authority to reach the matter of wage and hour regulations under the commerce clause,[265] the Constitution prohibited it from exercising this authority in a manner which interfered with traditional aspects

---

[261] See note 201 *supra*.

[262] 426 U.S. 833 (1975). The wide variety of approaches taken by the commentators is shown by the following selection of illustrative titles: Michelman, *supra* note 191 (focusing in particular on the implications for local government); Percy, National League of Cities v. Usery: *The Tenth Amendment is Alive and Doing Well*, 51 TULANE L. REV. 95 (176) [hereinafter cited as Percy]; Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977) [hereinafter cited as Stewart]; Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) [hereinafter cited as Tribe]; Comment, *Applying the Equal Pay Act To State and Local Governments: The Effect of* National League of Cities v. Usery, 125 U. PA. L. REV. 665 (1977); Note, *Federal Securities Fraud Liability and Municipal Issues: Implications of* National League of Cities v. Usery, 77 COLUM. L. REV. 1064 (1977) [hereinafter cited as *Federal Securities Fraud*]; Note, *Title VII and Public Employees: Did Congress Exceed Its Powers?*, 78 COLUM. L. REV. 372 (1979). *See also* MANDELKER & NETSCH, *supra* note 13, at 3-22; Comment, *The Rise of Municipal Sovereignty in Supreme Court Jurisprudence*, 2 URB. L. REV. 46, 48 (1977) (describing *National League of Cities* as "one of the 1975 Term's great surprises").

[263] Justice Rehnquist's opinion was joined by Chief Justice Burger and Justices Stewart and Powell. Justice Blackmun filed a separate concurring opinion, 426 U.S. at 856. Justice Brennan dissented in an opinion joined by Justices White and Marshall, *id.* at 856, and Justice Stevens dissented separately, *id.* at 880.

[264] 52 Stat. 1060, 29 U.S.C. § 201 (1976).

[265] U.S. CONST. art I, § 8, cl. 3. *See generally* McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980) (describing the broad scope of congressional action under the commerce clause).

of "state sovereignty."[266] Justice Rehnquist noted that, unlike a private employer who is "merely a factor in the shifting economic arrangements of the private sector of the economy,"[267] a State "is itself a coordinate element in the system established by the Framers for governing our Federal Union."[268] "State sovereignty" thus prevents Congress from interfering with states in structuring their internal governmental affairs, including employer-employee relationships in "typical" or "traditional" activities.[269] The Court noted further that its protection of "state sovereignty" would extend to all political subdivisions that derive their power and authority from their respective states. Since congressional displacement of "state decisions may substantially restructure traditional ways in which local governments have arranged their affairs,"[270] the Court ruled that "[i]nterference with integral governmental services provided by such subordinate arms of a state is therefore beyond the reach of congressional power under the Commerce Clause, just as if such services were provided by the State itself."[271]

Other than the broad phrase "functions essential to separate and independent existence,"[272] however, the opinion failed to pronounce adequate guidelines for determining *which* state and local government activities warrant such protection.[273] Moreover, the *National League of Cities* Court did not

---

[266] 426 U.S. at 851-52.

[267] *Id.* at 849.

[268] *Id.*

[269] *Id.* at 851.

[270] 426 U.S. at 849. *See also id.* at 850.

[271] *Id.* at 855-56 n.20. *See generally* City of Rome v. United States, 100 S. Ct. 1571, 1574-75 nn.11-12 (1980) (Powell, J., dissenting) (linking integrity of local government structures to community self-determination). For an analysis of developments in the political process supporting a renewed judicial role in protecting state sovereignty, as well as a discussion of the difficulties in developing a standard for judicial review of federal action which impacts upon the states, see Kaden, *supra* note 15.

[272] *Id.* at 845.

[273] Some guidance was provided by the Court's extended discussion of the effects of applying the federal minimum wage and overtime pay provisions to local government police and fire services. *See* 426 U.S. at 946-51. The Court specifically listed "fire prevention, police protection, sanitation, public health and parks and recreation," as activities that are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," 426 U.S. at 851, but it noted that these "examples" were "obviously not an exhaustive catalogue . . . of traditional operations." *Id.* at 851 n.16. At the other extreme was a state-operated, interstate railroad, which could be controlled by Congress in the post-*National League of Cities* world, because it was not one of the activities which "states have regarded as integral parts of their governmental activities." National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1975), *citing* United States v. California, 297 U.S. 175 (1936), as consistent with its ruling.

On remand, the district court did not specify further. Instead, it approved new Department of Labor regulations, 29 C.F.R. §§ 7752, 7753 (1978), which left the question of "traditional function" to be resolved in the future on a case-by-case basis. *See* National League of Cities v. Marshall, 429 F. Supp. 703 (D.D.C. 1977). *See also* Reeves, Inc. v. Stake, 100 S. Ct. 2271, 2282-83 n.1 (1980) (Powell, J., dissenting) (calling business subsidy programs traditional functions); Jordan v. Mills, 473 F. Supp. 13, 18 (E.D.

specify the source of its newly discovered federalism limitation upon congressional power. Some lower courts and commentators have attempted to anchor it in the tenth amendment[274] while others contend that "state sovereignty" is based more generally upon the "constitutional plan."[275] Justice Rehnquist himself has opted for the latter interpretation, as shown by a subsequent statement in *Nevada v. Hall*.[276] Whatever position the majority of the Court

---

Mich. 1979) ("prison administration may well be one of the few unambiguous examples of a traditional governmental function . . . that is not expressly enumerated in the *Usery* opinion.").

[274] *See* City of Rome v. United States, 472 F. Supp. 221, 240-41 (D.D.C. 1979) (McGowan, C.J.), *aff'd without mention of tenth amendment*, 100 S. Ct. 1548 (1980); Jordan v. Mills, 473 F. Supp. 13, 17-18 (E.D. Mich. 1979); Kaden, *supra* note 15, at 883-976; Percy, *supra* note 262. The only explicit mention of the tenth amendment in Justice Rehnquist's opinion for the Court in *National League of Cities* was his quotation of the following passage from Fry v. United States, 421 U.S. 542 (1975):

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' *United States v. Darby*, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

426 U.S. at 842-43.

[275] *See, e.g.*, Michelman, *supra* note 191. On this reading, state sovereignty would be a sort of a "penumbral" constitutional right, like the right of privacy, as articulated by Justice Douglas in Griswold v. Connecticut, 381 U.S. 479 (1965).

[276] In Nevada v. Hall, 440 U.S. 410 (1979), the Court ruled the Constitution imposes no limitation on the assertion of jurisdiction over the state of Nevada by the California state courts. Justice Rehnquist's dissent, joined by Chief Justice Burger, included the following interpretation of his *National League of Cities* opinion:

> Any document—particularly a constitution—is built on certain postulates or assumptions; it draws on shared experience and common understanding. On a certain level, that observation is obvious. Concepts such as "State" and "Bill of Attainder" are not defined in the Constitution and demand external referents. But on a more subtle plane, when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning. Thus, in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), Chief Justice Marshall, writing for the Court, invalidated a state tax on a federal instrumentality even though no express provision for intergovernmental tax immunity can be found in the Constitution. . . . More recently this Court invalidated a federal minimum wage for state employees on the ground that it threatened the States " 'ability to function effectively in a federal system.' " *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975). The Court's literalism, therefore, cannot be dispositive, and we must examine further the understanding of the Framers and the consequent doctrinal evolution of concepts of state sovereignty.

Id. at 433-34 (footnote omitted). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976) (Rehnquist, J.).

eventually accepts as to the constitutional source of "state sovereignty," the outcome, in the case of a conflict, will turn primarily on the specific constitutional basis for the congressional action alleged to interfere with that sovereignty.[277] Indeed, a close look at *National League of Cities* and its progeny reveals that "state sovereignty" poses a barrier primarily, if not exclusively, to congressional action pursued under the commerce clause.

2. The Limited Scope of *National League of Cities*

In a footnote, the *National League of Cities* Court sought to limit the breadth of its ruling by noting that the regulations it invalidated were based solely on Congress' power under the commerce clause.[278] The Court specifically refrained from expressing a view as to the validity of regulations affecting state or local governments involving exercises of Congress' spending authority[279] or enforcement powers under the post-Civil War Amendments.[280]

a. The Post-Civil War Amendment Enforcement Powers

Four days after *National League of Cities* was announced, the Supreme Court released an opinion, also authored by Justice Rehnquist, suggesting an answer to part of the question left unresolved in that *National League of Cities* footnote. In *Fitzpatrick v. Bitzer*,[281] the Court unanimously upheld the application of the Equal Employment Opportunity Act of 1972[282] to state and local governments. It ruled that Congress could require these authorities to provide back pay to victims of their employment discrimination. Rejecting an eleventh amendment defense, the Court reasoned:

> When Congress acts pursuant to § 5 [of the fourteenth amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their terms embody limitations on state authority.[283]

---

[277] This methodological approach would seem to be dictated by the language of the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Thus, the Court must, as it has in the cases discussed below, determine first how much authority has been delegated to the federal government under the particular constitutional provision (commerce clause, spending clause, or fourteenth amendment) relied upon to support federal actions. Since the tenth amendment and the "constitutional plan" appear to have a differential pull (like the moon creating waves and penumbras?) with respect to each of these delegated powers, the focus of judicial inquiry must be primarily on the particular federal power involved.

[278] *Id.* at 852 n.17.

[279] U.S. CONST. art. 1, § 8, cl. 1.

[280] U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

[281] 427 U.S. 445 (1976).

[282] Pub. L. No. 92-261, 86 Stat. 103 (1972), 42 U.S.C. § 2000 *et seq.* (1974).

[283] 427 U.S. at 456.

The *Fitzpatrick* Court thus found the Equal Employment Opportunity Act (passed pursuant to section five of the fourteenth amendment to expand the equal protection guarantee) distinguishable from the Fair Labor Standards Act challenged in *National League of Cities*, which was an exercise of Congress' commerce clause power.[284] The majority in *Hutto v. Finney*[285] later extended the *Fitzpatrick* rationale to include the granting of attorney's fees against a state to assist the enforcement of other constitutional rights incorporated into the due process clause of the fourteenth amendment.[286]

---

[284] *Id.* at 453 n.9. Initially, there was some question whether state and local governments would also be exempted from other labor acts, passed as amendments to the Fair Labor Standards Act considered in *National League of Cities*. Nearly all courts that have considered the issue, however, have determined that the Equal Pay Act, 29 U.S.C. § 206(d), is civil rights legislation, and therefore governed by *Fitzpatrick* rather than *National League of Cities*, despite the fact that Congress had employed the "commerce clause" label in enacting it. *See, e.g.*, Usery v. Allegheny County Institution Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977); Marshall v. Owensboro-Daviess County Hospital, 581 F.2d 116 (6th Cir. 1978). *But see* Howard v. Ward County, 418 F. Supp. 494 (D.N.D. 1976). Several lower courts have also held that the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-636 (1976), can validly be applied to state and local governments. *See, e.g.*, Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Remmick v. Barnes County, 435 F. Supp. 914 (D.N.D. 1977); Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976); Usery v. Board of Educ. of Salt Lake City, 421 F. Supp. 718 (D. Utah 1976).

[285] 437 U.S. 678 (1978). In an opinion by Justice Stevens, the Court rejected an eleventh amendment attack on an award under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1976). Even though the underlying substantive case had involved a cruel and unusual punishment claim premised on the eighth amendment, as applied to the defendant state though the due process clause of the fourteenth amendment, the Court relied heavily upon *Fitzpatrick* in concluding that Congress has plenary power to set aside the State's immunity from retroactive relief in order to enforce the fourteenth amendment. 437 U.S. at 693. The Court noted further that the Attorney's Fees Act merely authorized the imposition of attorney's fees as an element of costs, which "traditionally [have] been awarded without regard for the state's eleventh amendment immunity." *Id.* at 695. *See* Maher v. Gagne, 100 S. Ct. 2570 (1980) (eleventh amendment does not bar attorney's fee award for plaintiff who prevails against state on statutory, non-civil-rights claim).

[286] Justice Rehnquist's dissent in *Hutto* criticized the majority's reliance on *Fitzpatrick*:

> [I]n *Fitzpatrick*, . . . there was conceded to be a violation of the Equal Protection Clause which is contained *in haec verba* in the language of the Fourteenth Amendment itself. In this case the claimed constitutional violation is the infliction of cruel and unusual punishment, it is not at all clear to me that it follows that Congress has the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially "incorporated" into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters.

437 U.S. 678, 717 (1978) (Rehnquist, J., dissenting). *See also* City of Rome v. United States, 100 S. Ct. 1548, 1577 (1980) (Rehnquist, J., dissenting) (interpreting Congress' enforcement power under the fifteenth amendment more narrowly than the majority had).

Any doubt created by the fact that *Hutto* and *Fitzpatrick* rejected only eleventh amendment objections to congressional action[287] was removed by *City of Rome v. United States*.[288] The City there argued that the state sovereignty limitation articulated in *National League of Cities* prevented Congress from requiring, under the Voting Rights Act of 1965, prior federal approval for proposed changes in the municipal election code.[289]

In 1966, the Georgia General Assembly passed several laws which extensively amended the electoral provisions of the City's charter.[290] Contrary to the directive of the Voting Rights Act,[291] the City failed to seek preclearance

---

[287] That doubt was initially created by the fact that the sovereign immunity defense (premised on the eleventh amendment), which was rejected in *Fitzpatrick*, is quite fragile when standing on its own. It has long been subject to restrictive congressional interpretation and even abrogation, provided Congress states its intent explicitly. *See* Quern v. Jordan, 440 U.S. 332 (1979); Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Edelman v. Jordan, 415 U.S. 651 (1974); Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973); *see generally* Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 HARV. L. REV. 682, 697-98 (1976) (arguing, even before *National League of Cities* and *Fitzpatrick* were decided, that the tenth amendment imposes greater limits upon congressional action than does the eleventh amendment). Furthermore, the eleventh amendment defense does not apply to local governments. *Compare* Monell v. Dep't of Soc. Serv., 436 U.S. 658, 690 (1978) *with* Quern v. Jordan, 440 U.S. 332, 338 (1979).

[288] 100 S. Ct. 1548 (1980).

[289] 42 U.S.C. § 1973 (1976). The approval requirement is found in § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976). This requirement of preclearance by the Attorney General of any change in a "standard, practice, or procedure with respect to voting," *id.*, applies to those jurisdictions which come within the purview of the coverage formula set forth in § 4(b), 42 U.S.C. § 1973b(b) (1976). In 1965, Georgia was designated as a covered jurisdiction, thus subjecting all municipalities in the State to the preclearance requirement as well. *See* 100 S. Ct. at 1554.

[290] 100 S. Ct. at 1553. The Rome electoral scheme was modified as follows:

> (1) the number of wards was reduced from nine to three;
> (2) each of the nine commissioners would henceforth be elected at-large to one of three numbered posts established within each ward;
> (3) each commissioner would be elected by majority rather than plurality vote, and if no candidate for a particular position received a majority, a runoff election would be held between the two candidates who had received the largest number of votes;
> (4) the terms of the three commissioners from each ward would be staggered;
> (5) the board of education was expanded from five to six members;
> (6) each board member would be elected at-large by majority vote, for one of two numbered posts created in each of the three wards, with runoff *procedures identical to those applicable to city commission elections;*
> (7) board members would be required to reside in the wards from which they were elected;
> (8) the terms of the two members from each ward would be staggered.

Id.

[291] See note 289 *supra*.

for these electoral changes or for sixty annexations made during a ten-year period. When apprised of these changes and annexations in 1974, the U.S. Attorney General declined to give the required "preclearance."[292] The City and two of its officials then sought declaratory relief from the requirements of the Act and the Attorney General's adverse determinations, based on a variety of procedural and substantive grounds.[293]

In response to plaintiffs' argument that the preclearance provisions of the Voting Rights Act violated *National League of Cities* federalism contraints by infringing upon integral state and local government operations, Justice

---

[292] As the Court described the facts, the Attorney General

> concluded that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, these electoral changes would deprive Negro voters of the opportunity to elect a candidate of their choice. The Attorney General also refused to preclear 13 of the 60 Annexations in question. He found that the disapproved annexations either contained predominately white populations of significant size or were near predominately white areas and were zoned for residential subdivision development. Considering these factors in light of Rome's at-large electoral scheme and history of racial bloc voting, he determined that the city had not carried its burden of proving that the annexations would not dilute the Negro vote.

100 S. Ct. at 1554.

[293] Plaintiffs first raised two arguments asserting that the Court need not reach the merits of the case. The first was that the City may exempt itself from the coverage of the Act through the bailout procedure in § 4(a), 42 U.S.C. § 1973b(a) (1976). The Court rejected this contention on the ground that Rome failed to satisfy the "separate unit" status required for application of § 4(a). Plaintiffs' second contention was that the Attorney General's tardiness in reviewing the changes resulted in the changes being precleared according to the timing provisions of § 5 of the Act and the implementing regulations. The court interpreted these provisions to mean that the 60-day period, *see* 28 C.F.R. § 51.3(d) (1978), commenced anew each time the Attorney General seeks or receives additional information from the submitting jurisdiction.

In addition to the federalism claim under *National League of Cities*, see notes 294-97 *infra* and accompanying text, plaintiffs raised four other claims on the merits, all of which were rejected by the Court. The first claim was that the Voting Rights Act only prohibited voting practices that were purposefully discriminatory. Justice Marshall, relying on prior jurisprudence interpreting § 5, stated "Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent." 100 S. Ct. at 1559. A second claim was that the Act exceeded Congress' power to enforce the fifteenth amendment by prohibiting voting practices which lacked discriminatory intent, even if they were discriminatory in effect. The court also rejected this claim: "It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' " *id.* at 1562, which they were in the case at bar. *Id.* See note 212 *supra* and accompanying text. Plaintiffs argued further that the 1965 Act had outlived its usefulness and that the congressional extension of the Act in 1975 was improper. The Court refused to invalidate this extension, finding it to have been a "plainly constitutional method of enforcing the fifteenth amendment." *Id.* at 1565. As a final effort, plaintiffs claimed that first, fifth, ninth, and tenth amendment rights had been abridged as no election had been held in the City since 1974. The Court dealt with this argument summarily, contending that if there was any abridgement, the culprit was not the Voting Rights Act but the City officials. *Id.* at 1565.

Marshall[294] referred to the footnote limiting the scope of that decision.[295] He then read *Fitzpatrick* as ruling that the federal statute there considered was an appropriate exercise of the enforcement power under the fourteenth amendment,[296] which was barred neither by the eleventh amendment nor by any other federalism constraints. He added that similar broad, unfettered powers were also available under the enforcement section of the fifteenth amendment. He then concluded:

> We agree with the court below that *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation." Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, we hold that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act.[297]

The Court thus embraced the view that Congress' enforcement powers under the post-Civil War Amendments are virtually unfettered by federalism constraints.

b. The Taxing and Spending Powers

The Court has also given a broad reading to Congress' spending and taxing powers, even where those powers come into conflict with state and local government autonomy. For example, a claim that *National League of Cities*' state sovereignty constrains congressional spending was unceremoniously rejected in *North Carolina ex rel. Morrow v. Califano*.[298] In that case, the Court summarily affirmed the decision of a three-judge district court[299] that Congress could validly condition a state's receipt of federal health care aid upon the recipient state requiring a certificate of need[300] prior to new hospital construction, even though such a requirement would have violated the North Carolina Constitution.[301]

---

[294] Justice Marshall was joined by Chief Justice Burger and Justices Brennan, White, Blackmun and Stevens. Justices Blackmun and Stevens filed separate concurring opinions. *Id.* at 1567, 1569. Justice Powell dissented, *id.* at 1571, and Justice Rehnquist filed a dissenting opinion that was joined by Justice Stewart. *Id.* at 1577.

[295] See note 278 *supra* and accompanying text.

[296] 100 S. Ct. at 1563.

[297] *Id.*

[298] 435 U.S. 962 (1978).

[299] 445 F. Supp. 532 (E.D.N.C. 1977).

[300] Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300m-2(a)(4)(A)-(B) (1976). For an in-depth discussion of federal grants vis-a-vis state sovereignty, see Kaden, *supra* note 15, at 871-83.

[301] The North Carolina Supreme Court had previously ruled that the state statute authorizing a medical care commission to refuse issuance of a certificate of need for hospital construction on the basis of pre-existing bed capacity in the area, rather than on an evaluation of equipment and staff quality of private hospitals to be constructed on private land, violated N.C. CONST. art. 1, § 19 (due process clause). *See* Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973).

In rejecting North Carolina's claim that the "condition [was] coercive under the unique circumstances applicable to it,"[302] the district court had emphasized that "[t]he validity of the power of the federal government under the Constitution to impose a condition on federal grants made under a proper Constitutional power does not exist at the mercy of the State Constitutions or decisions of State Courts."[303] The district court noted that the congressional program before it was not compulsory or coercive, but merely gave "to the states an *option* to enact such [certificate of need] legislation and, in order to induce that enactment, offer[ed] financial assistance."[304] Moreover, if North Carolina chose not to exercise this option, by refusing to amend its constitution, the financial "impact of such loss [approximately $50 million dollars] could hardly be described as 'catastrophic' or 'coercive.'"[305] Thus, the district court was able to distinguish *National League of Cities* on the ground that the statute before it involved only the spending power and was not a coercive federal regulation of the State.[306] By summarily affirming the district court's ruling, the Supreme Court "seems to have accepted the principle that when Congress pays the piper as well as calls the tune, there is no real threat to the autonomy either of states or of individuals."[307]

Similarly, in *Massachusetts v. United States*[308] the Court upheld a federal aircraft registration tax[309] against a claim that its application to a state police

---

[302] 445 F. Supp. at 535.

[303] *Id.*

[304] *Id.* at 535-36 (footnote omitted).

[305] *Id.* at 535. In light of emerging state and local financial difficulties, see notes 345-49 *infra* and accompanying text, this conclusion may be open to serious question. *See generally* Comment, *Toward New Safeguards on Conditional Spending: Implications of* National League of Cities, 26 AM. U.L. REV. 726, 744-46 (1977). However, the plurality opinion in *National League of Cities* stated that the determination of whether a congressional act impinges on "state sovereignty" does not rest on a "particularized assessment of the actual impact" upon the state. 426 U.S. at 851. Instead, Justice Rehnquist's test involved the *risk* of serious impact on traditional government services. *See* Tribe, *supra* note 262, at 1076. *See also* Massachusetts v. United States, 435 U.S. 444, 461 (1978) (Brennan, J., for a plurality). *But see* National League of Cities v. Usery, 426 U.S. 833, 856 (1975) (Blackmun, J., concurring) (interpreting the Court's opinion as involving a balance between sovereign state interest and the necessity of federal regulation); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 20 (Supp. 1979) ("it is certainly . . . possible that some of the five majority votes in [*National League of Cities*] may have turned on the evidence in the record predicting substantial adverse effects upon state and local governments") [hereinafter cited as L. TRIBE].

[306] 445 F. Supp. at 536 n.10. *See* Usery v. Charleston County School District, 558 F.2d 1169 (4th Cir. 1977). This ruling is consistent with earlier decisions recognizing the breadth of Congress' spending power. *See* Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968); Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974).

[307] L. TRIBE, *supra* note 305, at 18. It is surprising that the Court should so readily accept this view of spending-with-strings-attached as non-coercive, when so much of the majority's opinion in *Rodriguez* rested upon the fact that state financing of education necessarily resulted in state control. See note 54 *supra* and accompanying text.

[308] 435 U.S. 444 (1978).

[309] The Court explained that the act under consideration, 26 U.S.C. § 4491, "imposed an annual 'flat fee' tax on all civil aircraft [including those owned by state and national governments] that fly in the navigible airspace of the United States." 435

helicopter unconstitutionally interfered with an essential and traditional state function. Justice Brennan's opinion, joined by the other three *National League of Cities* dissenters,[310] reviewed the doctrinal development of the implied state immunity from federal taxation and concluded:

> A requirement that States, like all other users, pay a portion of the costs of the benefits they enjoy from federal programs is surely permissible since it is closely related to the federal interest in recovering costs from those who benefit and since it effects no greater interference with state sovereignty than do the restrictions which this Court has approved.[311]

Then, in a portion of the opinion also joined by Justices Stewart and Powell, the Court found that the aircraft registration tax before it was such a nondiscriminatory user charge, and therefore was constitutional.[312]

U.S. at 446. The actual amount of the fee was determined by the weight and type of aircraft involved. The disputed charge considered in the case was $131.43 plus penalities and interest. .

[310] Justice Brennan's opinion for the Court was joined by Justices White, Marshall, and Stevens. Justices Stewart and Powell filed an opinion concurring in the conclusion that the registration tax was a valid user fee, but they did not join in the plurality's discussion of the general contours of state immunity from federal taxation, 435 U.S. at 470. Justice Rehnquist dissented in an opinion joined by Chief Justice Burger. *Id.* at 470.

[311] 435 U.S. at 461-62. The plurality opinion reasoned that "[a] nondiscriminatory taxing measure that operates to defray the cost of a federal program by recovering a fair approximation of each beneficary's share of the cost" does not "unduly" burden "essential state activities." *Id.* at 460. While "forcing a state to pay its own way when performing an essential function" does increase the cost of that service,

> an economic burden on traditional state functions without more is not a sufficient basis for sustaining a claim of immunity. Indeed, since the Constitution explicitly requires states to bear similar economic burdens when engaged in essential operations, see U.S. Const., Amdts. 5, 14; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (State must pay just compensation when it "takes" private property for a public purpose); U.S. Const., Art. I sec. 10, cl. 1; *United States Trust v. New Jersey*, 431 U.S. 1 (1977) (even when burdensome, a state often must comply with the obligations of its contracts), it cannot be seriously contended that federal exactions from the States of their fair share of the cost of specific benefits they receive from federal programs offend the constitutional scheme.

Id. at 461. For a discussion of *U.S. Trust* (and Justice Brennan's dissenting opinion), see notes 175-89 *supra* and accompanying text. For a discussion of the Burger Court's analysis of "takings" questions, see notes 386-94 *infra* and accompanying text.

[312] 435 U.S. at 466-70. The Court relied upon Evansville-Vanderburgh Airport Authority v. Delta Airlines, 405 U.S. 707 (1972), which had rejected commerce clause and right to travel attacks upon a $1.00 per head tax on commercial airline passengers, because it did not discriminate against commerce, was based upon "a fair approximation of use," and was not excessive in relation to the cost (to the taxing government) of the benefits conferred. *Id.* at 716-20. By substituting "state function" for "interstate commerce" in the *Evansville-Vanderburgh* test, the *Massachusetts v. United States* majority arrived at the following test for the constitutionality of federal government user charges imposed on state governments:

> So long as the charges do not discriminate against state functions, are based on a fair approximation of use of the system, and are structured to

Thus, a clear majority of the Burger Court has adopted a broad reading of congressional power pursued under the taxing and spending clause of article I of the Constitution.[313] So long as the tax imposed is a real user charge or the conditions attached to federal funding are in furtherance of the purposes of the spending program, the congressional action will survive a challenge premised on *National League of Cities*' state sovereignty.

C. *Rationalizations: The Critics Speak*

The *National League of Cities* principle thus emerges as an important, but limited, restraint on the exercise of congressional powers. Its essential theme is judicial protection of state and local governments in their "role of providing for the interests of [their] citizens in receiving important social services."[314]

> produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied, there can be no substantial basis for a claim that the National Government will be using its taxing powers to control, unduly interfere with, or destroy a State's ability to perform essential services.

435 U.S. at 466-67.

Justice Rehnquist dissented in *Massachusetts v. United States*, calling the three-pronged test "vague and convoluted." Though he had authored *Evansville-Vanderburgh*, from which the test was drawn, he argued:

> [C]ases regarding intergovernmental relations raise significantly different considerations. Commerce clause cases, while no doubt useful analogies, are not required to deal with the fact that the payer of the user fee is a State in our constitutional structure, and that its essential sovereign interests are entitled to greater deference than is due to ordinary business enterprises which may be regulated by both State and Federal Governments.

435 U.S. at 473. Justice Rehnquist (whose opinion was joined by Chief Justice Burger) also felt the majority had erred in making a finding, as a matter of law, that the tax in question was a permissible user charge. "I cannot, under my view of the law, accept as a substitute for such factual findings House and Senate Reports which merely state that a tax of this kind is 'generally viewed as a user charge.'" *Id.* at 474.

[313] Six members of the Court joined in upholding the flat-fee registration charge in *Massachusetts v. United States* under the three-pronged test, see notes 310-12 *supra* and accompanying text. Though Justice Rehnquist dissented in an opinion joined by Chief Justice Burger, the dissenters agreed "with the Court that respondent would have a valid defense to this action if it had established, or could establish, that the charge imposed was reasonably related to services rendered to the petitioner [the State of Massachusetts] by agencies of the Federal government." 435 U.S. at 474. Thus, if the test could have been tightened somewhat and more factual development presented, even the two dissenters might have joined in upholding this federal government tax on an essential state function. There were no dissents from the summary affirmance in *North Carolina v. Califano*, see notes 298-307 *supra* and accompanying text.

[314] Michelman, *supra* note 191, at 1172. *See* Tribe, *supra* note 262, at 1076. While approaching *National League of Cities* from slightly different starting points, Professors Michelman and Tribe arrive at similar conclusions. Michelman regards "state sovereignty" as "but a metaphor for its citizens' interests in the adequacy of a state's performance of its service function." Michelman, *supra* note 191, at 1184. Tribe argues, "The notion of claims of rights *against* states, therefore, should continue to play a crucial role in supporting claims of rights *of* states against the federal government." Tribe, *supra* note 262, at 1077 n.42 (emphasis in original). Though the Burger Court

Indeed, a link between protection of "state sovereignty" and "citizens' legitimate expectations of basic government services"[315] provides a useful tool for reconciling *National League of Cities* with *Fitzpatrick, City of Rome*, and *North Carolina v. Califano*. These cases hold that a congressional program which severely and unnecessarily[316] jeopardizes the ability of a state or local government to provide basic services[317] will be judicially invalidated, unless Congress has acted to further individual rights against the subnational government involved.[318] Similarly, when Congress pays for the additional cost of providing

---

may never adopt such a full-scale theory of affirmative constitutional obligation, the analysis of *National League of Cities* as a "service-provider" case appears to rest on firm ground.

[315] Tribe, *supra* note 262, at 1076. *But see* Stewart, *supra* note 262, at 1210-11 (showing admiration for the approach described in note 314 *supra*, but pointing to some of the practical difficulties in the enforcement of such claims for basic services against state and local governments).

[316] A congressional enactment may deal with an overriding national concern, such as pollution of the environment, provided the regulations involved are (from the perspective of the state and local governments as service-providers) the least restrictive means to that end. "Closer scrutiny of congressional legislation may be more appropriate with respect to alleged national concerns than with respect to rights in conflict, so as to ensure not only that the general subject is one of pressing national interest, but also that the specific area affected by the measure is itself one of substantial urgency." Tribe, *supra* note 262, at 1099 n.125. *Compare* National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring) (advocating a balancing approach and citing environmental protection as an area of justified national power). For further discussion of the *National League of Cities* implications on environmental legislation, see notes 424-45 *infra* and accompanying text.

[317] Just which services are to be deemed "basic" or "essential" under *National League of Cities* as written, or as reinterpreted by Tribe and Michelman, remains a difficult question. See note 273 *supra* and accompanying text. Some light is shed on this question by a series of recent cases that seem to be reviving the proprietary-governmental distinction. *See, e.g.*, Reeves, Inc. v. Stake, 100 S. Ct. 2271, 2278-79 (1980) (see note 259 *supra* and accompanying text); City of Lafayette v. Louisiana Power and Light, 435 U.S. 389, 403, 405 n.31 (municipally owned public utility not exempt from antitrust laws for its anticompetitive activities); *id.* at 418-19, 422 (Burger, C.J., concurring) (explicitly focusing on the proprietary and profit-making nature of the municipal utility there involved); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974) (limiting "state action" doctrine to public functions that have been "traditionally reserved exclusively to the State"). *See also* Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 135 (1978) (emphasizing that City was not acting in its "enterprise capacity" in limiting development for purpose of historic preservation); Ambach v. Norwick, 441 U.S. 68 n.6 (1979) (quoted in note 108 *supra*); *see generally* TRIBE, *supra* note 262, at 1076-77 n.42 ("a line is being drawn between services that a governmental unit delivers in fulfillment of claims of right of its citizens and those it delivers for a price simply to meet their desires, just as a private party might attempt to earn a profit by meeting those desires."); 11 CONN. L. REV. 126 (1978).

[318] See notes 281-97 *supra* and accompanying text. "While the legislature's choice of terminology in characterizing the source of its power—whether article I or section 5 of the fourteenth amendment—should not itself be dispositive, a judicial determination that Congress was in fact acting to further individual rights seems critical to the acceptance of such a defense" of congressional legislation against claims of state sovereignty. Tribe, *supra* note 262, at 1097.

a service, albeit with restrictions attached, the availability of that service will not be financially jeopardized by the congressional restraints. *Massachusetts v. United States* adds the further proposition that states, and presumably local governments, can be required to "pay their way" through non-discriminatory user charges. It is only where the taxing or spending power is disproportionately used that the Court is likely to limit congressional intervention.[319]

This analysis sheds additional light on the Burger Court's differential treatment of constitutional claims and statutory claims against local government. In the first situation—represented by *Rodriguez, Arlington Heights, City of Mobile,* and *Salyer*—local governments were resisting federal *judicial* interference on the basis of the self-rule aspect of local government—either community self-determination or citizen participation. In the second situation—represented by *National League of Cities*—they were instead resisting *congressional* interference on the basis of their role as service-providers.[320] This "service-provider" defense is somewhat weaker, since it will rarely prevail against congressional statutes that further individual rights, such as those upheld in *Fitzpatrick* and *City of Rome*, or that induce compliance financially, such as the statute upheld in *Califano*. The service-provider defense can, however, be invoked more easily by *state* governments than can the "community self-determination" defense.[321]

Since none of this constitutional analysis operates in a vacuum, it is necessary to consider next the local government financial situation, which both creates the factual background for the legal doctrines developed above

---

[319] *See* L. TRIBE, *supra* note 305, at 18-19; TRIBE, *supra* note 26, at 315-16.

[320] As noted above, see text at notes 198-203 & 261 *supra* and accompanying text, this situation involves action by one elected political body, Congress, which is in conflict with the action of another political body, a state or local government, and the supremacy clause which renders a self-rule defense by the latter inappropriate. Thus, a defense based on federalism must focus on the service-provider role. In fact, "what is 'Sovereign' about municipalities [for *National League of Cities* purposes] is not their legislative position or significance, but the states' customary reliance on them to provide for the interest of citizens in receiving certain important social services." Michelman, *supra* note 191, at 1171 (footnote omitted). *See id.* at 1181-82.

[321] Though Tribe does not employ the self-rule/service-provider terminology used here, he does draw a similar distinction between the two types of cases considered in this article:

> It would be wrong, however, to treat the Court's reference in *National League of Cities* to the value of local autonomy as a renewal of the theme seemingly implicit in decisions such as Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), which allowed individual rights to be subordinated to community rights of self-definition analogous to individual first amendment rights. First of all, in *National League of Cities*, the Court did not distinguish between the intrusion of the challenged amendments on state autonomy and their intrusion on local decisionmaking. This failure to distinguish between the state and local levels, coupled with the Court's emphasis on federalism and state sovereignty, indicates that it had no greater objection to the legislation as applied to the local than to the state level. And, whatever values of expression or of privacy may be possessed by decisionmaking at the level of communities like Belle Terre, it cannot plausibly be argued that decisionmaking at the state level possesses such values.

Tribe, *supra* note 262, at 1069 n.20.

and generates new problems calling for accommodation through the application of these legal doctrines.

IV. Putting the Show on the Road—Fiscal Realities

Ironically, the Burger Court's approach to federal-state and federal-local relations contains within it the seeds for destroying the local self-rule so often lauded by the Court. Although the Court has upheld local policy and programmatic choices unless confronted by quite substantial countervailing individual interests, the approval of virtually unfettered federal control over programs passed pursuant to the spending clause poses a serious threat to the state and local autonomy the Court seeks to protect. Current fiscal conditions require local governments to turn to the federal government to finance, or to help in financing, many of their most essential services. The power of Congress and federal agencies to condition receipt of these funds upon compliance with federal programmatic choices is likely to undercut self-rule by redirecting patterns of local service provision.

The current restrictive fiscal climate in major American cities is a reflection of two developments: the taxpayer's revolt, exemplified by California's Proposition 13, and the emerging fiscal crises in many older cities, highlighted by New York City's near default in 1975-76 and Cleveland's actual default in 1979. Both the taxpayer's revolt and the fiscal crises in the cities have set the stage for greater local government dependency on federal aid and, therefore, greater subordination to national control. In addition, respect for the interests of landowners and creditors in these troubled cities has already led the Court to articulate still further limitations on local autonomy.

A. *The Taxpayer's Revolt: Trouble at the Box Office*

Partly as a result of demographic and inflationary pressures,[322] and partly to pay the cost of state and local government expansion,[323] state and local taxes have grown in the last decade to what some voters consider epic

---

None of this is to suggest that the two arguments cannot overlap in some cases, *see, e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (discussed at notes 47-72 *supra* and accompanying text); Rizzo v. Goode, 423 U.S. 362 (1976) (discussed at notes 73-83 *supra* and accompanying text); Michelman, *supra* note 191, at 1173-74 (political accountability argument). It is simply to note that in legal doctrine, as in political analysis, see notes 11-18 *supra* and accompanying text, different aspects of local government will be emphasized in differing contexts.

[322] See notes 345-46 *infra*. For example, as the number of professional and middle-income taxpayers declines while welfare-sector dependency increases, central cities are forced to increase the burden upon the remaining taxpayers in order to meet expenses.

[323] State and local government expenditures have been rising at a faster rate than the economy as a whole. *See* Mandelker & Netsch, *supra* note 13, at 259 (state-local expenditures as percentage of GNP for 1954-1976); Economic Rpt. of the Pres., Jan. 1975, at table B-72 (1978 figures); Shannon & Weissert, *After Jarvis: Tough Questions for Fiscal Policymakers*, 4 Intergovernmental Perspective 8, 9 (1978) (state-local taxes and expenditures as percentage of state personal income for 1948-1977).

proportions.[324] They have responded to this increase with substantial pressure for new and stricter tax and spending limits. This recent move by taxpayers is not without precedent; states have long employed constitutional and statutory restrictions upon the power of their local governments to impose real estate taxes.[325] The earliest such restrictions were developed in the 1870's and the 1880's.[326] Further limitations emerged during the depression of the 1930's in response to the alarming level of tax delinquency resulting from the decline in personal incomes.[327] Though there were some adjustments in limitation formulas during the early 1970's,[328] there was no general call for tax relief until later in that decade, when voters began to react to the rapid rise in property assessments. The initial taxpayer stirrings rose to a crescendo with the severe limitations embodied in Proposition 13, adopted by California voters in June 1978,[329] and in comparable proposals considered by seven states in November of that year.[330] This movement to limit the level of

---

[324] Sentiments of some voters might be summed up by the following:

> Noah must have taken into the Ark two taxes, one male and one female, and did they multiply bountifully! Next to the guinea pig, taxes must have been the most prolific animals.

W. ROGERS, *The Autobiography of Will Rogers* 19 (1949).

[325] Gelfand, *Financial Integrity*, *supra* note 177, at 551-54.

[326] *See* U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS ON LOCAL TAXING POWERS 27-29, 34-35 (1962) [hereinafter cited as ACIR].

[327] *See id.* at 30, 36-37; Bird, *The Trend of Municipal Tax Delinquency*, XIX MUNICIPAL FINANCE (1947); Macchiarola, *Local Finances Under the New York State Constitution with Emphasis on New York City*, 35 FORDHAM L. REV. 263, 263-69 (1965).

[328] For a discussion of levy limits, developed by some states as a replacement for the tax rate limit, see U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE LIMITATIONS ON LOCAL TAXES AND EXPENDITURES 12 (1977); Gelfand, *Financial Integrity*, *supra* note 177, at 552-53.

[329] CAL. CONST. art. XIII A. For discussions of subsequent legislative developments, see Doerr, *The California Legislature's Response to Proposition 13*, 53 SO. CAL. L. REV. 77 (1979); Comment, *Taxation; implementation of Proposition 13*, 10 PAC. L.J. 573 (1979).

[330] In November 1978, provisions similar to California's Proposition 13 were approved in Idaho, IDAHO CODE § 63-923 (1978), and Nevada, Question No. 6, Gen. Election Ballot [copy on file with author]. The Nevada proposal required passage again in Nov. 1980 before it could be effective as a constitutional amendment. In the same election, voters in non-binding referenda throughout Illinois and in parts of Massachusetts favored limits on state and local taxes. Perry, *Voters in 16 States Give Approval to 80% of Tax-cutting Initiatives*, Wall St. J., Nov. 9, 1978, at 4, col. 1 [hereinafter cited as Perry]. However, proposed constitutional amendments similar to Proposition 13 failed in Michigan (Tisch Amendment) and Oregon. *Id. See also* Emshwiller, *Tax-Cut Advocates Fight One Another Instead of City Hall*, Wall St. J., Aug. 31, 1978, at 1, col. 2 [hereinafter cited as Emshwiller]. For a good analysis of the salient features of all the above proposals and the final vote count, see Shannon, Slowing Down Public Sector Growth—Hard Questions for Policymakers, Address to Utah Chapter American Society for Public Administration, Dec. 12, 1978, at A-7 [hereinafter cited as Shannon] [on file with the author].

In September 1979, voters rejected a proposal to cut property taxes in Dade County, Florida by 99 percent. Apparently the proponents had intended a much smaller cut but had misstated the proposal when collecting signatures. Hence the negative vote cannot be taken as reflecting a positive attitude toward property taxes. In-

real estate taxes has been paralleled by a drive in various states[331] to adopt state and local government expenditure limits.[332] Although the emphasis is slightly different, both types of limits attempt to restrict the rapid growth of state and local taxes[333] and the expansion of local government operations.[334]

These new tax and expenditure limits are likely to have significant effects upon local government financial arrangements and, consequently, upon the role of local government in our federal system. Initially, the new property tax limits will reinforce the trend away from reliance on real estate taxes as the principal source of local revenue.[335] The substituted forms of local taxation,

---

deed, nearly 35 percent of the voters favored the draconian tax reduction that was proposed. *See* Miami Herald, Sept. 9, 1979, at 1-A, col. 3; *id.*, Sept. 10, 1979, at 1-A, col. 3; *id.*, Sept. 19, 1979, at 1-A, col. 2.

Few of the tax cut proposals in the November 1980 balloting succeeded. For example, the Nevada proposal failed to obtain the second passage required to make it a constitutional amendment. Michigan and Oregon voters also rejected tax cut measures submitted to them, as they had in 1978. Massachusetts voters, however, approved a substantial cut in real and personal property taxes. *See State Issues Confronting Voters Tuesday Include Sweeping Tax Cuts and Secession*, Wall St. J., Oct. 29, 1980, at 8, col. 1; *Massachusetts Passes Tax Cut Package, But Many States Snub Similar Proposals*, Wall St. J., Nov. 6, 1980, at 6, col. 1.

[331] *See, e.g.*, ARIZ. CONST. art. 9, § 17 (West Supp. Pamph. 1979-1980) (State spending limit); CAL. CONST. art. XIII B (state and local expenditure limit); N.J. STAT. ANN. § 40A:4-45.2 (West Supp. Pamph. 1978) (five-percent municipal spending limit); *id.* at § 52:9H-6 to 52:9H-13 (State spending increases calculated by elaborate formula); MICH. CONST. art. IX, §§ 25-34 (Nov. 1978) (State spending limit); TENN. CONST. art. 2, § 24 (Nov. 1977) (same); TEX. CONST. art VIII, § 22 (Nov. 1978) (same). Voter reaction has not, however, been uniform. In the November 1978 elections, voters in Colorado and Oregon rejected constitutional state expenditure limits, and Nebraska voters defeated a proposal to impose a constitutional municipal spending limit. *See* Perry, *supra* note 330; Shannon, *supra* note 330. *See generally* Perry & Hyatt, *While California Votes on Taxes, Other States Mull Spending Limits*, Wall St. J., June 6, 1978, at 1, col. 1; Shannon, *A Fiscal Note*, INTERGOVERNMENTAL PERSPECTIVE 24 (Fall 1978).

[332] Rather than restricting the amount of revenue a government can derive from a particular source, as real estate tax rate limits and levy limits do, an expenditure limit restricts the amount of money a government can spend (or budget for spending) in a particular year. It is usually framed in terms of a percentage increase over the prior year's expense budget. The first expenditure limit was adopted by statute in Arizona in 1921. Subject to certain exclusions, it prohibits the budgets of Arizona counties and cities from rising more than ten percent over that of the prior year. *See* ARIZ. REV. STAT. § 12:42-303(C)-(D) (1976). For a discussion of the actual operation of this expenditure lid, see Gelfand, *Financial Integrity*, *supra* note 177, at 554, 576-78, and sources cited therein.

[333] Proposition 13 and similar provisions focus exclusively on lowering the property tax. Advocates of expenditure limits contend that their approach, by contrast, will result in a general lowering of all taxes. *See, e.g.*, Emshwiller, *supra* note 330.

[334] The expenditure limits are more directly focused upon controlling public sector growth than either levy limits or tax rate limits.

[335] Less than half of the revenue of large local governments is derived from real estate taxes. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FEDERAL-STATE-LOCAL FINANCES: SIGNIFICANT FEATURES OF FISCAL FEDERALISM: TRENDS 3, 36-38 (1976); Blaydon & Gilford, *Financing the Cities: An Issue Agenda*, 1976 DUKE L.J. 1057, 1102-05 [hereinafter cited as Blaydon & Gilford]. New York City, in fact, derives less than 25 percent of its Revenue Budget from real estate taxes. *See* City of

however, will probably have serious exclusionary effects. For example, one form of taxation, already employed by California municipalities to replace revenues lost due to the limits of Proposition 13, is the development impact tax. It requires a developer to pay substantial fees for the privilege of developing land within an incorporated area.[336] Since this type of tax will inevitably be passed on to homebuyers in the form of increased initial costs, it will contribute to the substantial disparity between current homeowners and new purchasers already created by Proposition 13 and its progeny.[337] The taxation and expenditure limits may also force local governments to adopt even more restrictive zoning devices to maintain their tax bases and to keep service costs low. Under the standard announced by the Burger Court in *Arlington Heights*, few constitutional barriers would preclude such action by local governments.[338]

In addition to employing newer taxes and solidifying their tax and service bases, local governments will probably seek increased state and federal aid to supplement their limited local revenues. If the majority in *San Antonio Independent School District v. Rodriguez*[339] was correct in assuming that increased state aid inevitably leads to increased state control, this trend will severely weaken the self-rule role of local governments.[340] In fact, the Supreme Court's acquiescence, in *North Carolina v. Califano*,[341] to congressional policy conditions attached to grant-in-aid programs creates a substantial likelihood of increased control over local government programmatic choices by federal government administrators. Although local governments also receive relatively unrestricted general revenue sharing funds,[342] it is unlikely that the

---

New York, Adopted Budget-Fiscal Year 1979, at i; City of New York, Adopted Budget-Fiscal Year 1981, at i; *see also* 2 MOODY'S INVESTOR SERVICE, MUNICIPAL & GOVERNMENT MANUAL 2502-03 (1980) (budget figures for fiscal years 1972-79).

[336] HOUS. & DEV. REP. 398 (BNA) (1978); *see* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976). *See also The Post-13 Barrage of New Local Taxes*, TAX REVOLT DIGEST 1, 7 (November 1978).

[337] Proposition 13 rolls back the taxable value of currently-owned property to its 1975-76 "full cash value," but property purchased after that fiscal year is to be taxed at its appraised value at the time of sale. CAL. CONST. art. XIII A, § 2(a). Thus, in an inflationary spiral, a more recently purchased house will always have a higher "full cash value" for tax purposes than a comparable house that has been held by the same owner for a longer period of time. This disparate treatment has been held not to violate equal protection. *See* Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

[338] See notes 21-30 *supra* and accompanying text. Moreover, even if local officials do not adopt restrictive land use ordinances, the residents may decide to impose restrictions through zoning referenda, also held to be constitutional by the Burger Court. *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971). See notes 84-101 *supra* and accompanying text.

[339] 411 U.S. 1 (1973). See notes 47-62 *supra* and accompanying text.

[340] *See* Marlin, *Coping with Proposition 13*, in COPING WITH CUTBACKS IN MUNICIPAL REVENUES, 51, 65 (N.Y.I.L.J. ed. 1978) [hereinafter cited as COPING]; Nathan, *Is Local Control the Loser in Jarvins Vote?*, Wall St. J., June 8, 1978, at 26, col. 3. *See also* McCarthy, *Living With Proposition 13*, STATE LEGISLATURES 16 (Sept. 1978).

[341] 435 U.S. 962 (1978), *aff'g* 445 F. Supp. 532 (E.D.N.C. 1977). See notes 298-307 *supra* and accompanying text.

[342] *See* Brown, *Beyond the New Federalism—Revenue Sharing in Perspective*, 15 HARV. J. LEGIS. 40-55 (1977) (arguing that while the 1976 amendments to State and

level of this support will be sufficient to substitute for the revenue losses sustained as a result of Proposition 13 and similar fiscal limitations.[343] Increased federal aid, therefore, is likely to be required in the form of restrictive categorical grants-in-aid.

B. *The Fiscal Crisis: Finding an Angel*

Though local and regional conditions vary somewhat,[344] the principal factors contributing to local government financial difficulties prior to the taxpayer's revolt were demographic trends,[345] nationwide economic recessions coupled with inflation,[346] employee pension plans,[347] state and federal imposition of financial burdens,[348] and local mismanagement.[349] More recently, energy cost increases have exacerbated the problems. Like the taxpayer's revolt, the urban fiscal crisis will probably lead to increased reliance on state and federal financing. Furthermore, local, state, and federal responses to the crisis will place increased pressure on the Burger Court to limit both the self-rule and the service-provider autonomy it has accorded to local governments. The principal areas affected are statutory regulation of municipal securities, judicially protected creditors' rights, and municipal bankruptcy legislation.

Local Fiscal Assistance Act eliminated the latter's priority expenditure scheme, they also increased federal oversight of state and local activities by expanding the antidiscrimination provisions, strengthening enforcement thereof by expanding citizen standing and attorney's fees, and by mandating public hearings on use of revenue sharing funds).

[343] *See* sources cited in 340 *supra*.

Indeed, for 1978, general revenue sharing constituted only $6.8 billion, while the various grant-in-aid programs totaled $67.8 billion. *See* U.S. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, SPECIAL ANALYSES BUDGET OF THE UNITED STATES, GOVERNMENT FISCAL YEAR 1980, at 60 (1979).

[344] *See* Blaydon & Gilford, *supra* note 335.

[345] *Id.* at 1058-59. In general, central cities—particularly in the Northeast and Midwest—have experienced substantial losses of industrial employment, decreases in professional and middle-class taxpayers, and increases in the welfare-section dependent population. *Id.* at 1058-59. *See* TEMPORARY COMMISSION ON CITY FINANCES, THE CITY IN TRANSITION: PROSPECTS AND POLICIES FOR NEW YORK (1978).

[346] Recessions increase presssures on local government social services, while reducing revenues from local sales and income taxes. The impact of inflation is particularly severe, because local government services are labor-intensive. *See* U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES 32-42 (1973). Though inflation may increase revenues from sales and income taxes, the gap between assessments prevents real estate tax receipts from keeping pace with inflation.

[347] *See* Blaydon & Gilford, *supra* note 335, at 1067; *New York City—What Lies Ahead?*, 12 COLUM. J.L. SOC. PROB. 587, 613-15 (1976); Leavens *et. al.*, *City Personnel: The Civil Service and Municipal Unions*, in AGENDA FOR A CITY 605 (L. Fitch & A. Walsh eds. 1970).

[348] *See* Gelfand, *Financial Integrity*, *supra* note 177, at 556-57; Univ. of Calif. at Riverside, Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts, June 20, 1979.

[349] *See id.* at 557-58, and sources cited therein.

1. Debt Financing and Disclosure

Local governments finance their capital programs by issuing various types of securities, principally general obligation[350] and revenue bonds.[351] In addition, several forms of short-term notes[352] are employed primarily to meet cash flow problems.[353]

One response to the New York City financial crisis was pressure to mandate increased public disclosure by municipal securities issuers.[354] Congress has considered several bills[355] which would substantially increase federal in-

---

[350] These bonds are backed by the full faith and credit of the issuing municipality. *See* Flushing Nat'l Bank v. Municipal Assistance Corporation, 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976). Thus, the issuing government obliges itself to raise whatever funds are necessary through its taxing power, primarily the real property tax, to pay the principal and interest as they become due. *See* G. CALVERT, FUNDAMENTALS OF MUNICIPAL BONDS 3 (9th ed. 1973); Guandolo, *Tax Limitations: Impact Upon General Obligation Bonds, Rental Bonds, Special Assessment Bonds and Payment of Debt Service*, at 6, printed as supplement to COPING, *supra* note 340.

[351] See note 177 *supra* and accompanying text. Because of the more limited source of revenue standing behind them, revenue bonds nearly always pay a greater rate of interest than general obligation bonds. *See generally* Gelfand, *Financial Integrity*, *supra* note 177, at 560-61, and sources cited therein. For a discussion of attempts to increase the security of revenue bonds by placing a state's or city's "moral commitment" behind them, see Griffith, *"Moral Obligation" Bonds: Illusion or Security?*, 8 URB. LAW. 54 (1976); Quirk & Wein, *A Short Constitutional History of Entities Commonly Known as Authorities*, 56 CORNELL L. REV. 521 (1971); MANDELKER & NETSCH, *supra* note 13, at 390-95.

[352] The principal short-term obligations are tax anticipation notes (issued in anticipation of the collection of, and secured by, some specific tax such as the real estate *ad valorem*), revenue anticipation notes (issued in anticipation of the collection of, and secured by, user charges, non-real estate taxes, or intergovernmental transfers), and bond anticipation notes (issued in anticipation of, and secured by, the sale of bonds). *See* Greenberg, *Municipal Securities: Some Basic Principles and Practices*, 9 URB. LAW. 338, 347-49 (1977). *See, e.g.*, GA. CONST. art. IX, § 7, par. 4, N.Y. LOCAL FIN. L. §§ 20.00, 23.00-25.00, 39.00 (McKinney Supp. 1977-78); N.C. GEN. STAT. §§ 159-169, 159-170 (1976); PA. STAT. ANN. tit. 53, § 6780-202 (Purdon Supp. 1978-79).

[353] For discussions of the abuse of short-term debt, see U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, UNDERSTANDING THE MARKET FOR STATE AND LOCAL DEBT 10-11 (1976); Gelfand, *Financial Integrity*, *supra* note 177, at 567-69, 589.

[354] For more comprehensive discussions, see Currier, *Mandating Disclosure in Municipal Securities*, 8 FORDHAM URB. L.J. 67, 72-79 (1979); Neugebauer, *Municipal Securities: Disclosure Requirements*, 9 URB. LAW. 305 (1977); Peterson, Doty, Forbes & Bourque, *Searching for Standards: Disclosure in the Municipal Securities Market*, 1976 DUKE L.J. 1177; Comment, *State Sovereignty's Impact on Federal Regulation of Municipal Securities*, 7 GOLDEN GATE L. REV. 577 (1977) [hereinafter cited as *State Sovereignty*]; Note, *The Constitutionality of Federal Regulation of Municipal Securities Issuers: Applying the Test of National League of Cities v. Usery*, 51 N.Y.U. L. REV. 982 (1976); Comment, *Federal Regulation of Municipal Securities: A Constitutional and Statutory Analysis*, 1976 DUKE L.J. 1261 [hereinafter cited as *Federal Regulation*]; Note, *Federal Regulation of Municipal Securities: Disclosure Requirements and Dual Sovereignty*, 86 YALE L.J. 919 (1977); *Federal Securities Fraud*, *supra* note 262.

[355] *See, e.g.*, H.R. 2724, 95th Cong., 1st Sess. (1977); S. 2339, 95th Cong., 1st Sess. (1977); S. 2574, 94th Cong., 1st Sess. (1975); S. 2969, 94th Cong., 2d Sess. (1976) [hereinafter cited as H.R. 2724, S. 2339, S. 2574, and S. 2969, respectively].

volvement in municipal debt financing. The Eagleton Bill,[356] in particular, raises serious questions under *National League of Cities*, because it would permit the Securities Exchange Commission to issue a "stop order"[357] effectively preventing the floating of municipal bonds which it determined not to comply with the securities registration requirements.[358] This direct federal veto over financing needed for essential local services, coupled with the enormous cost of complying with the registration provisions, is arguably an undue interference with local government's traditional autonomy.[359] Yet, the substantial national interest in maintaining integrity in the nationwide municipal credit market[360] would weigh heavily in favor of the constitutional validity of a more restrained form of municipal securities regulation.[361]

2. Creditor's Rights

A related area, recently re-emerging as a subject of federal constitutional dimension, is creditors' rights against state and local authorities. The New York City fiscal crisis generated numerous state[362] and lower federal[363] court

---

[356] S. 2574, *supra* note 355. Essentially, this bill would amend section 3(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(2) (1976), to remove the current exemption afforded municipal securities. Municipal issuers would then be required to file a registration statement with the Securities Exchange Commission (SEC) before offering a new issue to the public, and they would be subject to the Act's civil liabilities. *See* sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k(a), 77*l* (1970).

[357] *See* section 8(b) of the Securities Act of 1933, 15 U.S.C. § 77H(b) (1976).

[358] Since bond counsel, underwriters, and dealers are extremely unlikely to handle any obligations subject to a stop order, the municipality would, as a practical matter, be unable to float the bond.

[359] *See State Sovereignty*, *supra* note 354, at 614-16; *Federal Regulation*, *supra* note 354, at 1310-19. *But cf.* U.S. Trust v. New Jersey, 431 U.S. 1, 25 (1977) ("purely financial" matters covered by bond covenant not essential attribute of sovereignty for purposes of reserved power doctrine).

[360] *New York City Financial Crisis, Hearings Before Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess., Oct. 9, 10, 18, and 23, 1975; Securities and Exchange Commission Staff Report on Transactions in Securities of the City of New York, to the Subcommittee on Economic Stabilization of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess., Aug., 1977.

[361] *See* Gelfand, *Financial Integrity*, *supra* note 177, at 580 n.193.

[362] Perhaps the most significant state case was Flushing National Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976), in which the New York Court of Appeals invalidated an act that required holders of New York City short-term debt to choose between a payment moratorium and an exchange of their notes for Municipal Assistance Corporation (MAC) bonds. *Id.* at 733, 358 N.E.2d at 850, 390 N.Y.S.2d at 24. *See* 1975 N.Y. Laws ch. 868-70 (McKinney 1975); N.Y. PUB. AUTH. L. § 3030-40 (McKinney Cum. Supp. 1970-1975). The court ruled that the state constitution required City notes, like general obligation bonds, to be backed by the City's "faith and credit." *See* N.Y. CONST. art. VII, § 2. *Compare* Ropico v. City of New York, 425 F. Supp. 970 (S.D.N.Y. 1976) (upholding the same Moratorium Act under federal contract clause, on basis of analysis similar to that of trial court and dissent in *U.S. Trust*).

Although the note payments required by *Flushing Bank* posed some difficulties for the City's fiscal recovery plan, default and bankruptcy were averted by a coordinated state-federal loan scheme, *see* SEC, Final Report in the Matter of Transactions in the

cases dealing with this subject. Moreover, the climate of imminent fiscal doom and the existence of severe investor uncertainty may have contributed to the Burger Court's articulation of a very stringent contract clause standard for public authority bonds in *U.S. Trust v. New Jersey*.[364] The limitations framed by that case may, however, pose serious difficulties for city officials forced to make delicate financial decisions in times of fiscal crisis.[365]

3. Municipal Bankruptcy Legislation

Should the financial situation in older American cities deteriorate further, officials may be forced to seek relief under the new federal municipal bankruptcy provisions. Some creditors, in turn, would likely challenge the constitutional validity of this federal enactment under *National League of Cities* principles.

In response to the New York City fiscal crisis, Congress, acting under its bankruptcy power,[366] adopted special provisions for municipal debt composition. Chapter IX of the Bankruptcy Act was reenacted and amended[367] to specify elaborate procedures whereby local governments, with state permission,[368] can petition for federal court approval of a debt adjustment plan that will be binding on dissenting creditors.[369] These provisions were intended to

---

Securities of the City of New York, 16 SEC Docket 951, 953 (Feb. 20, 1979), financial restructuring, *see* Supplemental Staff Report, in *id.* at appendix, and court rulings more favorable to the City. *See, e.g.*, cases cited in note 363 *infra*.

Other important state cases dealt with investment by pension funds in State, City, and MAC securities. *See* Westchester Chapter, Civil Serv. Employees Ass'n, Inc., v. Levitt, 50 A.D.2d 1105, 373 N.Y.S.2d 659 (3d Dep't), *aff'd on certified question*, 37 N.Y.2d 591, 375 N.Y.S.2d 294, 337 N.E.2d 748 (1975); New York City Civil Serv. Retired Employees Ass'n Roche, Index No. 18043/75 (Sup. Ct. N.Y. Co. Oct. 17, 1975). *See also* Comment, *New York A City in Crisis: Fiscal Emergency Legislation and the Constitutional Attacks*, 6 FORDHAM URB. L.J. 65 (1977) [hereinafter cited as Fordham Comment]; Note, *Creditors' Remedies in Municipal Default*, 1976 DUKE L.J. 1363.

[363] *See, e.g.*, Tron v. Condello, 427 F. Supp. 1175 (S.D.N.Y. 1976) (rejecting contract clause attack on investment by pension funds in City and MAC securities); Ropico v. City of New York, 425 F. Supp. 970 (S.D.N.Y. 1976) (described in note 362 *supra*). *See also* In re New York City Securities Litigation, [Transfer Binder] CCH FED. SEC. L. REP. ¶ 97,528 (1976). *See generally* Fordham Comment, *supra* note 362.

[364] 431 U.S. 1 (1977). See notes 176-89 *supra* and accompanying text.

[365] *See* TRIBE, *supra* note 26, at 471-72; Hurst, *supra* note 189, at 26.

[366] "Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8(4).

[367] These provisions are currently codified in 11 U.S.C. §§ 103, 901-946 (Supp. III 1979).

[368] The new act protects state sovereignty by requiring both state and local government acquiescence before its provisions can be invoked. Thus, unlike a private party, a local government may not be subjected to an involuntary composition but must initiate the proceedings by filing a court petition. Moreover, the state must authorize such a filing. 11 U.S.C. § 109(c) (Supp. III 1979). It should be further noted that states themselves may not seek this judicial debt adjustment—only their political subdivisions. *Id.* at §§ 101(29), 109(c).

[369] For a more detailed discussion of the new municipal bankruptcy provisions, see Greenberg, *Municipal Securities: Some Basic Principles and Practices*, 9 URB. LAW. 338

assist insolvent political subdivisions, to further the national interest in uniform treatment of creditors, and to ensure uniformity in the national bond market.[370] Although the restrictions contained in these procedures might create expense, delay and uncertainty for local governments,[371] the protections for state and local autonomy built into the bankruptcy provisions,[372] coupled with the significance of the national interests involved, weigh heavily in favor of a ruling that the new provisions do not violate the state sovereignty principles represented by *National League of Cities*. Therefore, the Court would be likely to uphold these new statutory provisions.[373]

In short, the taxpayer's revolt and the urban fiscal crises threaten to weaken the local government autonomy favored by the Burger Court in a variety of ways. First, local governments will be forced to adopt national and state administrative priorities in order to obtain needed grants-in-aid. Furthermore, city officials may feel the need to undercut broad home rule authorizations, previously given by their states, by seeking direct state authorization for activities affecting the local economy. This direct authorization should protect them against the substantial damage remedies foreshadowed by the ruling in *City of Lafayette*.[374] They may also need to restructure operating procedures in order to avoid damage recoveries under *Monell*.[375] Finally, congressional and judicial attempts to inform and protect municipal creditors in times of fiscal crisis may further erode local government financial independence.

(1977); Patchan & Collins, *The 1976 Municipal Bankruptcy Law*, 31 U. MIAMI L. REV. 287 (1977); Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871 (1976) [hereinafter cited as *Municipal Bankruptcy*]; Note, *The Recent Revision of the Federal Municipal Bankruptcy Statute: A Potential Reprieve for Insolvent Cities?*, 13 HARV. J. LEG. 549 (1976).

[370] The first congressional attempt to provide a system for municipal debt adjustment, Act of May 24, 1934, ch. 345, 48 Stat. 798, was ruled unconstitutional, because it impinged upon the "separate and independent existence" of the states and their subdivisions. Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513 (1936). A subsequent modified statute, Act of Aug. 16, 1937, 50 Stat. 653, was upheld in United States v. Bekins, 304 U.S. 27 (1938).

[371] There is also a danger of interference with local government policy decisions, *i.e.*, interference with the self rule aspect of local government, by the bankruptcy court. *See Municipal Bankruptcy*, *supra* note 369, at 1894-95.

[372] See note 368 *supra*. *See also* Bankruptcy Act § 82(c), 11 U.S.C. § 904 (Supp. III 1979) (limiting Bankruptcy Court's power once it has jurisdiction); *Municipal Bankruptcy*, *supra* note 369, at 1894.

[373] The other possible attack, which some creditors might pursue, is that the new provisions place too much judicial authority in the hands of an article I court—the bankruptcy court. *See, e.g.*, 11 U.S.C. § 105 (Supp. III 1979).

[374] 435 U.S. 389 (1978). See notes 234-41 *supra* and accompanying text.

[375] Municipalities that do not adapt to developing constitutional interpretations, Owen v. City of Independence, 100 S. Ct. 1398 (1980), or federal statutory developments, Maher v. Gagne, 100 S. Ct. 2570 (1980); Maine v. Thiboutot, 100 S. Ct. 2502 (1980), may be subjected to substantial damage remedies and attorney's fee awards. See notes 232-33 *supra* and accompanying text. *Maher* and *Hutto* make it clear that even state agencies will not be able to assert an eleventh amendment defense to attorney's fee awards in such statutory or constitutional cases. See notes 285-86 *supra* and accompanying text.

V. A Play Within A Play[376]— Local Government and Environmental Regulation

The best way to illustrate the impact of these constitutional doctrines and financial developments is to consider a representative area of the law—control over the physical and aesthetic environment—from a local government perspective. The decisions in this field do fit within the predicted patterns—judicial deference to local self-determination and judicial protection against national interference with local service-provision, tempered by recognition of economic realities. Thus the Supreme Court has upheld local aesthetic regulations that interfere to a significant extent with the interests of individual property owners. It also appears that the Court will not require local (or state) authorities to enforce national pollution control standards, unless the pollution control program is financed by federal funds.

A. *The Aesthetic Environment: The Preservation of Sets from Great Plays of the Past*

Increasingly, local governments are seeking to preserve historically significant and architecturally aesthetic structures in their communities.[377] Some of the reasons behind this development are instrumental—the need for good urban housing despite skyrocketing costs for new construction[378] and the economic advantages of maintaining "tourist-oriented charm."[379] Others are non-instrumental—to "enhance the quality of life for all."[380] Relying on

---

[376] "Theater takes place all the time wherever one is and art simply facilitates persuading one that this is the case." J. Cage, Silence 174 (1961).

[377] As the Supreme Court has noted: "Over the past 50 years, all 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 107-08 (1978) (citing publications by the National Trust for Historic Preservation). *See also* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574 (1972) [hereinafter cited as *Chicago Plan*]; Wilson & Winkler, *The Response of State Legislation to Historic Preservation*, 36 L. & Contemp. Prob. 329 (1971). The federal government has also encouraged this process through the National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 916, 16 U.S.C. § 470(b) (1974). *See generally* Gray, *The Response of Federal Legislation to Historic Preservation*, 36 L. & Contemp. Prob. 314 (1971). A 1976 amendment to the Act created the National Historic Preservation Fund, Pub. L. No. 94-422, tit. II, 90 Stat. 1313, 16 U.S.C. § 470 (Supp. 1979), and the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976), contains provisions designed to encourage historic preservation efforts by the private sector. *See* Comment, *Historic Preservation and the Tax Reform Act of 1976*, 11 U. San Francisco L. Rev. 453 (1977).

[378] *See* Boasberg, *Historic Preservation: Suggested Directions for Federal Legislation*, 12 Wake Forest L. Rev. 75, 75-76 (Spring 1976); Marcus, *The Grand Slam Grand Central Termination Decision: A Euclid for Landmarks, Favorable Notice for TDR and A Resolution of the Regulatory/Taking Impasse*, 7 Ecology L.Q. 731, 750 (1978) [hereinafter cited as Marcus].

[379] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (upholding ban of push-cart food sales in New Orleans' French Quarter in face of equal protection attack on its "grandfather provision" exempting two such vendors). *See also* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975) (rejecting claim that strict architectural control ordinance applicable to the Quarter constituted a "taking"), *cert. denied*, 426 U.S. 905 (1976).

[380] Penn Central Transportation Co. v. New York City, 438 U.S. 104, 108 (1978).

both types of justification,[381] New York City (the City) adopted a Landmarks Preservation Law in 1965 which created a Landmarks Preservation Commission (the Commission) with power to designate historic, scenic or cultural landmarks, landmark sites, and historic districts located in the City.[382] The owners of a building designated as an historic landmark under this law[383] were subject to substantial development and use restrictions and were required to assume certain repair and maintenance duties.[384]

Pursuant to this New York scheme, Grand Central Terminal was designated as an historic landmark in 1967. The next year, the Terminal's owner, Penn Central Transportation Company, and the lessees of its development rights applied to the Commission for permission to construct a multi-story office building above the Terminal. Despite compliance with other applicable zoning ordinances, the Commission rejected both their plan for a 53-story building, as involving too much destruction to the Terminal's facade, and their plan to cantilever a 55-story tower above the existing facade as "nothing more than an aesthetic joke."[385] Penn Central and its lessees then sued the City in the New York State courts, contending that the Commission's actions under the Landmarks Preservation Law constituted a "taking" of their property without "just compensation" in violation of the fifth and fourteenth amendments[386] and a deprivation of property in violation of the due process clause of the fourteenth amendment.[387]

Although the trial court granted the injunction sought, its ruling was reversed by the Appellate Division.[388] The New York Court of Appeals, in turn, unanimously affirmed the Appellate Division in an opinion authored by Chief Judge Breitel.[389] He rejected out of hand Penn Central's "taking"

---

[381] *See* N.Y.C. ADMIN. CODE ch. 8A, § 205-1.0(a), (b) (1976).

[382] *Id.* at § 207 *et seq.*

[383] The process involves Commission investigation, notice to the owner, a hearing, Commission designation, New York City Board of Estimate approval, and the right to judicial review. *Id.* at § 207.

[384] For more detailed consideration of these restrictions imposed by the Landmark Preservation Law, see Penn Central Transportation Co. v. City of New York, 438 U.S. at 110-15; Rankin, *Operation and Interpretation of the New York City Landmarks Preservation Law*, 36 L. & CONTEMP. PROB. 366 (1971); Comment, *Cultural Ecology: The Urban Landmark as an Environmental Resource*, 11 U. SAN FRANCISCO L. REV. 720, 722-25 (1977) [hereinafter cited as S.F. Comment].

[385] 438 U.S. at 118 (quoting the Commission's report). The Commission explained, "[Q]uite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity." *Id.*

[386] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This prohibition is made applicable to the states through the fourteenth amendment. *See* Chicago, B. & Q. Railroad Co. v. Chicago, 166 U.S. 226 (1897).

[387] See note 150 *supra*.

[388] Penn Central Transportation Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975).

[389] Penn Central Transportation Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). For valuable commentary on Judge Breitel's innovative approach to the case, see Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977) [hereinafter cited as Costonis], and S.F. Comment, *supra* note 384.

claim on the ground that there had been no transfer of control over the Terminal to the City, but only a restriction on its use.[390] He further concluded that this restriction did not constitute a due process violation, because Penn Central could obtain a "reasonable return" on the "privately created and privately managed ingredient" of the Terminal.[391] The Supreme Court affirmed the New York court's decision by a 6 to 3 margin in an opinion authored by Justice Brennan.[392] The majority opinion focused upon the "taking" question, but analyzed it in terms of "reasonable return."[393] As Justice Brennan viewed it:

> The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a "taking" requiring the payment of "just compensation."[394]

This statement, as well as Judge Breitel's more dramatic framing of the issue,[395] indicates that the two courts not only accepted, but also built upon the broad deference to community self-determination represented by such cases as *Belle Terre* and *Arlington Heights*. First, they placed beyond peradventure the judicial acceptance of particular exercises of local self-rule premised solely upon non-instrumental aesthetic considerations.[396] This position was a

---

[390] 42 N.Y.2d at 328, 366 N.E.2d at 1274, 397 N.Y.S.2d at 916. In an earlier unanimous opinion authored by Chief Judge Breitel, the New York Court of Appeals had ruled that unreasonable regulations not resulting in actual government control of the property would be invalidated but would not give rise to claims for just compensation under an inverse condemnation "taking" theory. Fred F. French Investing Co., Inc. v. City of New York (*Tudor Parks*), 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976). *Accord*, HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976); *see also* Freilich, Growcock, & Ungar, *1977-78 Annual Review of Local Government: Judicial and Constitutional Intervention in Municipal Fiscal Affairs*, 10 URB. LAW. 573, 581 (1978) [hereinafter cited as Freilich *et al.*] (characterizing this as the "majority view").

[391] 42 N.Y.2d at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

[392] 438 U.S. 104 (1978). He was joined by Justices Stewart, White, Marshall, Blackmun, and Powell. Justice Rehnquist dissented, in an opinion joined by Chief Justice Burger and Justice Stevens, on the ground that a compensable taking had taken place. 438 U.S. at 138, 144.

[393] Justice Brennan specifically reserved judgment on the "inverse condemnation" issue, which Judge Breitel had treated as foreclosed. Compare note 390 *supra* and accompanying text with note 407 *infra* and accompanying text.

[394] 438 U.S. at 107.

[395] "In broadest terms, the problem in this case is determining the scope of governmental power, within the Constitution, to preserve, without resorting to eminent domain, irreplaceable landmarks deemed to be of inestimable social or cultural significance." 42 N.Y.2d at 327, 366 N.E.2d at 1272, 397 N.Y.S.2d at 915.

[396] The Commission's refusal of building permission, which the majority upheld, was based solely on the detrimental effect the proposed construction would have upon "the majestic approach from the south." *See* 438 U.S. at 117 (returning to the Commission's report). While disagreeing with the particular means employed to preserve Grand Central Terminal, the dissenters did accept aesthetic considerations as a

natural outgrowth of language in *Belle Terre*, which upheld single-family zoning,[397] and in the later *Young v. American Mini Theaters, Inc.*,[398] which upheld the dispersal and control of "adult businesses" to preserve residential neighborhoods.[399] Yet, it went beyond these cases by upholding a land use regulation whose direct economic benefits were much less immediate.[400] Second, while earlier zoning cases had upheld land use regulations covering a relatively broad geographic area, the regulations upheld in *Penn Central* placed development restrictions on particular plots and buildings.[401] Finally, the just compensation claim rejected in *Penn Central* was premised on much more specific constitutional language[402] than the claims of the plaintiffs in *Arlington Heights, Belle Terre, Rodriguez*, or *Ambach*.[403] Yet, the quasi-

---

legitimate objective of local government land use regulation. *See* 438 U.S. at 147 n.10, 152 n.14 (Rehnquist, J., dissenting).

[397] See notes 33-37 *supra* and accompanying text.

[398] 427 U.S. 50 (1976). See notes 173-74 *supra* and accompanying text.

[399] 427 U.S. at 71-73. The Court gave very little attention to alternative, less restrictive means of furthering this goal, *e.g.*, through concentration rather than dispersion of Detroit's adult businesses.

[400] Indeed, historic preservation restrictions actually prevent a landowner from making the "best economic use" of his or her property, even though the proposed use is not a "noxious" one in the same sense as the prohibited brickyard in Hadacheck v. Sebastian, 239 U.S. 394 (1915), or the sand and gravel pit in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), or the adult bookstores and theaters in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (see notes 398-99 *supra* and accompanying text). This is shown by the fact that historic preservation restrictions forbid even development that is in compliance with existing zoning laws or building codes. Thus, the *Penn Central* Court had to reject the so-called "noxious use" takings test. *See* 438 U.S. at n.30. *See generally* Marcus, *supra* note 378, at 742.

[401] Judge Breitel's opinion acknowledged this directly, by noting, "This is not a zoning case" in which "[e]ach property owner in the zone is both benefited and restricted from exploitation," nor one involving "landmark regulation of a historic district . . . designed to maintain the character, both economic and esthetic or cultural, of an area." Though he found some common characteristics, "landmark regulation is different because the burden of limitation is borne by a single owner. He may or may not benefit from that limitation but his neighbors most likely will. . . . To this extent, such restrictions resemble 'discriminatory' zoning restrictions," 42 N.Y.2d at 329-30, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917-18. Justice Rehnquist's dissent made a great deal of this concession, 438 U.S. at 139 n.2. However, his quotation from Judge Breitel's opinion left out the crucial three sentences which followed: "There is, however, a significant difference. Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment. When landmark regulation is involved, there is such a reason: the cultural, architectural, historical, or social significance attached to the affected parcel." 42 N.Y.2d at 330, 366 N.E.2d at 1275, 397 N.Y.S.2d at 918.

Justice Brennan's majority opinion went even further in concluding that "the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they may be found in the city." 438 U.S. at 132. *See id.* at nn.28 & 32. The counsel for the New York City Planning Commission argued that this "language would seem to encourage communities to think big—in terms of large comprehensive landmark designation programs—not only for their own sake, but also as a fortification against charges of arbitrariness." Marcus, *supra* note 378, at 744-45.

[402] See note 386 *supra*.

[403] *Arlington Heights, Rodriguez*, and *Ambach* involved equal protection attacks upon local ordinances or state statutes, while *Belle Terre* was based upon the penumbral rights of privacy and travel.

constitutional doctrine of community self-determination developed in these earlier cases nevertheless provided a basis for both the New York Court of Appeals and the Supreme Court to reject the challenge to the operation of the City's historic preservation scheme, thereby expanding local government discretion over land use regulation.

Two cross-cutting factors appear to have contributed to the broad judicial deference of *Penn Central*. First, New York's historic preservation scheme did not involve direct local government self-interest to the same extent as the repeal of the covenant considered in *U.S. Trust*.[404] Yet, at the same time, there was judicial recognition, not far from the surface, that New York City would have been unable, in the midst of its fiscal crisis, to purchase the Terminal's development rights through its eminent domain powers.[405]

Justice Brennan's *Penn Central* opinion did, however, explicitly acknowledge that there are limits to the extent of community self-determination. These limits simply had not been exceeded by the particular development restrictions reviewed.[406] Indeed, the Court quite clearly left open the possi-

---

[404] See note 184 *supra* and accompanying text. This may well have been an important factor persuading Justice Blackmun (author of *U.S. Trust*) and Justices Stewart and Powell (non-participants in that decision) to join Justice Brennan and the other two *U.S. Trust* dissenters to form a six-man majority in *Penn Central*. Compare note 178 *supra* with note 392 *supra*.

[405] Chief Judge Breitel observed:

> In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future.

42 N.Y.2d at 337, 366 N.E.2d at 1278, 397 N.Y.S.2d at 922. Breitel, having written the majority opinion in Flushing National Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976), was well aware both of the City's financial crisis and of the need for judicial protection of property rights during that crisis. See note 362 *supra*.

Justice Rehnquist's dissent also saw the financial question as crucial to the resolution of the *Penn Central* case:

> The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers of whether it can instead be imposed entirely on the owners of individual properties.

438 U.S. at 138, 139 (Rehnquist, J., dissenting). *See also id.* at 152-53. It is interesting to contrast Justice Rehnquist's view, that the burden here should be borne by the taxpayers (through the City's payment of "just compensation") rather than by the individual property owner, with an earlier case involving a conflict between a citizen whose civil (rather than property) rights had been violated by local government officials. In that case, he (again joined by the Chief Justice) concluded that local government financial considerations dictated, in effect, that the wronged individual rather than the taxpayers (through the City's liability under 42 U.S.C. § 1983) should bear the burden. *See* Monell v. Department of Soc. Serv. of the City of New York, 436 U.S. 658, 714 (1978) (Rehnquist, J., dissenting).

[406] In concluding that Penn Central could still obtain a reasonable return on the Terminal, both the Supreme Court, 438 U.S. at 137, and the New York Court of Appeals, 42 N.Y.2d at 334-35, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920-21, treated as

bility that local governments may be required to compensate landowners for a more extreme form of regulation, even for one that did not result in an actual transfer of ownership or control.[407] More recently, in *Agins v. City of Tiburon*,[408] the Court again raised the specter of such an "inverse condemnation" remedy.

Thus, although it was born within a different constitutional context, *Penn Central* can be recognized as the progeny of the judicial deference cases discussed in Section II–A above. Like them, it upholds a very broad expansion of local government self-rule, while warning that certain overall limits still remain. It is likely to fortify those local governments which choose to be aggressive with respect to energy and neighborhood conservation,[409] as well as historic preservation. These governments should, however, avoid extreme regulations which totally destroy the value of a landowner's property, and therefore constitute a taking.

B. *Regulation of Environmental Pollution: Who Controls the Ambiance?*

Recent attempts to curtail air and water pollution—to prevent harm to the urban environment, rather than to preserve its attractive aspects—have raised serious questions regarding congressional intereference with state and

---

significant the fact that the unused development rights could be transferred to several other Penn Central-owned parcels in the vicinity. New York's scheme permits owners of landmarks who are prevented by historic preservation regulations from developing their property to the full extent allowed by zoning controls to transfer their unused development rights to nearby parcels. *See* N.Y.C. Zoning Resolution, §§ 74-79 to -793. Interestingly, transferability was substantially expanded as a result of a 1969 amendment initiated by Penn Central. Marcus, *supra* note 378, at 737, 747. The legitimacy conferred upon transferable development rights by these *Penn Central* decisions should encourage local governments to employ this device as a component in their programs for historic preservation and other forms of environmental and energy-related land use control. *See id.* at 750-51. An impressive, dispute-filled literature on transferable development rights has already developed. *See, e.g.*, Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976); *Chicago Plan*, *supra* note 377, at 584-89; Costonis, *supra* note 329; Costonis, *"Fair Compensation" and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Marcus, *Air Rights Transfers in New York City*, 36 L. & CONTEMP. PROB. 372 (1971); Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974).

[407] The Court felt it necessary, even before beginning the main body of its analysis, to make the "implicit" explicit: "[W]e do not embrace the proposition that a taking can never occur unless Government has transferred physical control over a portion of a parcel." 438 U.S. at 123 n.24. *See* Freilich *et al.*, *supra* note 390, at 58-84.

[408] 100 S. Ct. 2138 (1980). Justice Powell, for a unanimous Court, concluded that it was unnecessary to consider whether a state may limit "taking" remedies to mandamus and declaratory judgment, because no taking had occurred in the case before him. A case on this term's Supreme Court docket may result in a final determination of the issue. *See* San Diego Gas & Electric Co. v. City of San Diego, 48 U.S.L.W. 3820 (June 17, 1980) (postponing ruling on jurisdiction in appeal from California courts raising question of proper remedy for inverse condemnation).

[409] This would include innovative zoning schemes to encourage both active and passive solar housing, wind energy systems, and energy conservation.

local governments as service-providers. Though most of these environmental policies are formulated at the national level,[410] the federal government must, as a practical matter, rely upon state and local authorities to implement many of its policies.[411] The requisite federal-state partnership has, however, largely failed to produce timely implementation of congressional pollution control standards.[412] Part of this failure can be attributed to the insufficient administrative resources available to the Environmental Protection Agency (EPA), which has primary responsibility for these programs at the federal level.[413] Moreover, state and local officials have been "exposed to intensive pressure from politicians, industry, unions, and citizens reacting to the costs (economic and otherwise) of controlling pollution and the possibility of unemployment and curtailment of economic development."[414] These pressures upon state and local officials tend to prevail, because there are few strong incentives for them to assume the political, economic, and administrative burdens required to further national environmental goals.[415] As a result, state and local environmental agencies are generally underfunded and understaffed.

The principal inquiry, therefore, is: can Congress compel state and local governments to act, or must it induce their cooperation by providing financial incentives?[416] To derive an answer to this politico-legal question, one must consider, first, the extent of congressional power to regulate land use planning and environmental enforcement directly, without state and local involvement; second, the constitutional limits upon national authority to impose enforcement duties, on local authorities; and, third, the practical limits on federal funding of pollution control schemes.

---

[410] The "dormant" commerce clause, see notes 257-59 *supra* and accompanying text, places limits on the power of state and local governments to formulate policies that involve screening out environmental waste. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978) (invalidating New Jersey law that forbade importation of solid waste from other states for disposal in its landfills).

[411] This dependence is due to "the nation's size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officals' limited implementation and enforcement resources." Stewart, *supra* note 262, at 1196. *See also* 116 CONG. REC. 19,204 (1970) (statement of Rep. Staggers).

[412] *See, e.g.*, Downing & Brady, *Implementing the Clear Air Act: A Case Study of Oxident Control in Los Angeles*, 18 NAT. RES. J. 237 (1978) [hereinafter cited as Downing & Brady]; Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978) [hereinafter cited as Henderson & Pearson].

[413] Stewart, *supra* note 262, at 1200-01. There were also a variety of background difficulties—the unrealistic "aspirational" goals, the complexity of pollution and of the technology needed to reduce it, the expense of uniform regulatory measures, and the increased costs occasioned by the 1973 energy crisis and recession. *Id.* at 1199-1200. Henderson & Pearson, *supra* note 412;. La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771 (1977).

[414] Stewart, *supra* note 262, at 1201.

[415] Apparently the federal government faced similar problems in obtaining cooperation by state and local officials in the enforcement of fugitive slave and prohibition laws. *See* Henderson & Pearson, *supra* note 412, at 1431-32 n.10, 1464 n.183.

[416] *See Zoning*, *supra* note 159, at 1610-18.

1. Direct Federal Enforcement

The commerce clause grants Congress substantial authority to control private uses of land, air, and water that have significant spillover effects in other political jurisdictions. Thus, federal regulatory authority is particularly inappropriate with respect to developments along state borders and within especially critical ecosystems.[417] Federal control can be extended, under a variety of theories, to more localized pollution sources owned by private individuals or corporations.[418] The application of federal land use regulations to the detailed locational decisions made by state and local governments may be somewhat more debatable,[419] but even this potential impairment of the service-provider role can be justified where state and local actions have spillover effects.[420] In short, the congressional enactment of a nationwide pollution control program, to be enforced by federal officials against both public and private sources, should pose no insuperable[421] constitutional obsta-

---

[417] *Id.* at 1578-79, 1588, 1614-15. The physical movement of pollutants across state borders has been held to constitute interstate commerce that can be regulated by Congress. *See* South Terminal Corp. v. EPA, 504 F.2d 646, 677 (1st Cir. 1974); United States v. Bishop Processing Co., 287 F. Supp. 624, 629-32 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970).

[418] Congress would be able to impose controls on any firm (however local) using goods produced in interstate commerce, upon all potential polluters in order to minimize competition between those located in states with lax environmental controls and those subject to strict state controls, or upon firms affecting inland or coastal waters. *See* Stewart, *supra* note 262, at 1222-23, and sources cited therein. *See generally* McLain v. New Orleans Bd. of Realtors, 444 U.S. 232 (1980) (describing Congress' broad power to regulate activities "affecting commerce"). The commerce clause also places limits on the power of state and local governments to act within the same sphere. See note 410 *supra*.

[419] One commentator gives the following illustration: "[w]here federal regulations would erect significant impediments to the location and construction of state medical, sanitation, or recreational facilities, it might be concluded that the regulations 'displace state policies regarding the manner in which they will structure delivery of those governmental services.' " *Zoning*, *supra* note 159, at 1614-15, *quoting* National League of Cities v. Usery, 426 U.S. 833, 847 (1976).

[420] *See* National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring); Illinois v. City of Milwaukee, 406 U.S. 91 (1972); District of Columbia v. Train, 521 F.2d 971, 989 (D.C. Cir. 1975), *vacated on other grounds sub nom.* EPA v. Brown, 431 U.S. 99 (1977); Stewart, *supra* note 262, at 1229-30.

[421] Federal regulation of private property would, of course, still be subject to "taking" and due process challenges comparable to those discussed in Section V-A *supra*. *See* Sierra Club v. EPA, 540 F.2d 1114, 1139-40 (D.C. Cir. 1976) (restrictions imposed under Clean Air Act of 1970 to prevent "significant deterioration" of air already cleaner than national ambient standards did not constitute a taking), *vacated and remanded* (for consideration of mootness), 434 U.S. 809 (1977); In re Surface Mining Regulation Litigation, 452 F. Supp. 327 (D.D.C. 1978); *same*, 456 F. Supp. 1301 (D.D.C. 1978) (ruling upon various statutory, due process, and takings challenges to Department of Interior mining regulations); *see generally Zoning*, *supra* note 159, at 1620-24; Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713 (1977) [hereinafter cited as Stewart, *Developments*].

cles.[422] It is only where national legislators or officials attempt to force state and local governments to finance and enforce such a federal program that *National League of Cities* constraints are likely to arise.[423]

2. Attempted Federal Control of State and Local Actors

The Supreme Court has not yet outlined the precise contours of constitutional constraints on federal interference with state and local decisions in the environmental field. In *Environmental Protection Agency v. Brown*[424] the Court vacated and remanded, on the issue of mootness,[425] rulings by the Fourth, Ninth and District of Columbia Circuits that the Clean Air Act of 1970[426] could not, without raising tenth amendment objections, be interpreted to authorize the EPA to order states to adopt and enforce federal transportation control programs.[427]

The history of these cases began with the Clean Air Act's elaborate "cooperative federalism" scheme for attaining and maintaining national ambient air quality standards.[428] That Act gave the EPA 120 days to propose and promulgate national primary and secondary ambient air quality standards.[429] No more than nine months later, each state was to produce a State Implementation Plan (SIP), showing compliance with primary standards

---

[422] Even such a comprehensive federal pollution control act need not preempt all state and local activity in the field. For example, in both the Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1977), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1977), Congress recognized the importance of retaining a limited state/local sphere of influence. *See generally* British Airways Bd. v. Port Authority, 564 F.2d 1002, 1010-11 (2d Cir. 1977); Andersen, *Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 WIS. L. REV. 633 (1978) [hereinafter cited as Anderson].

[423] The same *National League of Cities* constraints would not apply to congressional attempts to end local exclusionary zoning, *see* McDougal, *supra* note 31, at 342-43 (making such a proposal), because that legislation would be based on Congress' power under § 5 of the fourteenth amendment, as a means of increasing individual civil rights. See notes 280-97 *supra* and accompanying text. National environmental legislation, on the other hand, does not so easily fit into this rights-expansion analysis. *See* Stewart, *supra* note 262, at 1245-46. This is because a citizen's assertion of a "right" to clean air and water is more akin to claiming a "right" to minimum wages and maximum hours (as would municipal workers covered by the legislation invalidated in *national League of Cities* itself). *See Tribe*, *supra* note 262, at 1103. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY 82-84 (1978) (distinguishing between "principles" and "policies").

[424] 431 U.S. 99 (1977).

[425] *Id.* at 104. EPA had modified its regulations somewhat and agreed to modify them further. *Id.* at 103.

[426] 42 U.S.C. § 1857c-5(a) (1975), *now recodified as* 42 U.S.C.A. § 7410 (1979).

[427] *See* Maryland v. EPA, 530 F.2d 215, 224-28 (4th Cir. 1975); Arizona v. EPA, 521 F.2d 825, 826 (9th Cir. 1975); Brown v. EPA, 521 F.2d 827, 837-42 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 990-94 (D.C. Cir. 1975). Although not appealed, the contrary ruling of the Third Circuit, Pennsylvania v. EPA, 500 F.2d 246, 259-62 (3d Cir. 1974), is open to serious question, since it relied upon Maryland v. Wirtz, 392 U.S. 183 (1968), which was overruled in *National League of Cities*. *See also* Brown v. EPA, 521 F.2d 827, 838 n.45 (9th Cir. 1975) (concluding Third Circuit had read *Maryland v. Wirtz* too broadly), *vacated on other grounds*, 431 U.S. 99 (1977).

[428] *See* 42 U.S.C.A. §§ 7607-7410, 7413 (1979).

[429] 42 U.S.C. § 1857c-4 (1976), *now recodified* as 42 U.S.C.A. § 7409 (1979).

within three years and secondary standards within a specified reasonable time.[430] SIPs were then to be submitted to the EPA for review.[431]

The Act also grants the EPA Administrator authority to approve or disapprove a proposed SIP in whole or in part,[432] and promulgate a federally developed implementation plan to serve in place of the disapproved portions.[433] Once a final SIP is developed, the state has primary responsibility for its enforcement, but the EPA has broad authority to bring federal enforcement actions when the state fails to act.[434]

Following this scheme, the EPA promulgated several ambient air quality standards in 1971[435] and requested the states to submit SIPs with automobile emission controls adequate to meet these standards.[436] In response to the local opposition of downtown merchants, commuters, and real estate developers to restrictions on automobile use and "indirect sources" of pollution,[437] many states refused to include these controls in their SIPs.[438] The EPA reacted by promulgating provisions for inclusion in the SIPs of recalcitrant

---

[430] The SIPs were to include, *inter alia*, "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls." 42 U.S.C. § 1857c-5(a)(2)(B), *now recodified* as 42 U.S.C.A. § 7410(a)(2)(B) (1979).

[431] *See* Brady & Downing, *Amending the Clean Air Act: The Past is Prologue*, 3 ENV. POLICY & L. 158 (1977) [hereinafter cited as Brady & Downing]. The EPA review process is governed by 42 U.S.C.A. § 7410(a)(2) (1979).

[432] 42 U.S.C.A. § 7410(a)(2) (1979).

[433] 42 U.S.C. § 7410(c)(1) (1979). The Supreme Court has unanimously ruled that the EPA Administrator may not take into account, in making his review, the economic and technological feasibility of a proposed SIP, because the Clean Air Act is designed to force regulated sources to develop new technological solutions to pollution problems. Union Electric Co. v. EPA, 427 U.S. 246, 256-58 (1976). *See* Comment, *Infeasibility Claims Following* Union Electric Co. v. EPA, 62 IOWA L. REV. 923 (1977).

[434] *See* Brady & Downing, *supra* note 431, at 158. For a detailed discussion of the enforcement options open to EPA, see Mintz, *Air Pollution Control* 2-14 to 2-16, in IICLE, ENVIRONMENTAL LAW HANDBOOK (1978).

[435] Sulfur oxides, particulate matter, carbon monoxide, photo-chemical oxidants, hydrocarbons, and nitrogen dioxide were covered. *See* 40 C.F.R. §§ 50.4-50.11 (1971).

[436] Initially, the EPA granted extensions to many states for the submission of transportation control plans and for the attainment of primary standards for the auto-related pollutants—carbon monoxide, hydrocarbons, and photochemical oxidants. These extensions were held to be impermissible under the Act. *See* National Resources Defense Council, Inc. v. EPA, 475 F.2d 968 (D.C. Cir. 1973); *see also* City of Riverside v. Ruckelshaus, 4 E.R.C. 1728 (C.D. Cal. 1972). The EPA then issued a notice, 38 Fed. Reg. 7323 (Mar. 20, 1973), requiring states that had not already done so to submit transportation control plans by April 15, 1973, showing achievement of primary standards for auto-related pollutants by May 31, 1975. *See generally* 38 Fed. Reg. 30,626 (Nov. 6, 1973); Stewart, *Developments*, *supra* note 421, at 725-27.

[437] "Indirect sources" include such developments as shopping centers, large parking facilities, sports complexes, and highways. *See* 39 Fed. Reg. 7270-85 (Feb. 25, 1974). Regulations on this subject were subsequently suspended. *See* Brown v. EPA, 521 F.2d 827 (1975), *vacated and remanded*, 431 U.S. 99 (1977); Stewart, *supra* note 421, at 726 n.66. *See also* 42 U.S.C. § 7410(a)(5)(A) (1978), *added by* Pub. L. 95-95 (forbidding EPA Administrator to require inclusion of indirect source review program as condition of approval of an SIP).

[438] Henderson & Pearson, *supra* note 412, at 1463; Stewart, *Developments*, *supra* note 421, at 725-26; Stewart, *supra* note 262, at 1203-04.

states which required the latter to adopt "retrofit," inspection, and maintenance programs and indirect source control programs.[439] Several states then challenged the regulations, contending that the EPA lacked authority to subject them to criminal and civil penalties for failure to adopt legislation, provide funds, and administer federal programs to control privately produced emissions. In 1975, three courts of appeals agreed, ruling that the 1970 Act did not "make the states departments of the" EPA[440] or authorize its administrator to "commandeer the[ir] regulatory powers."[441] Even without benefit of the Supreme Court's subsequent exegesis of its federalism doctrine in *National League of Cities*, these courts stressed that any alternative reading of the Act would result in its invalidity under the tenth amendment.[442]

Given the need for state and local enforcement of federal environmental, welfare, and energy programs, it is likely that the Supreme Court soon will have to confront the difficult constitutional issue it avoided by remanding *Brown*[443] and Congress postponed by amending the Clean Air Act in 1977.[444] Indeed, the Ninth Circuit on remand, reinforced by the *National*

---

[439] *See* 40 C.F.R. §§ 52.257(e), .258(f), .259(f) (1976) (transportation controls); *id.* §§ 52.242(f), .243(f), .244(f) (air pollution controls).

[440] Brown v. EPA, 521 F.2d 827, 835 (9th Cir. 1975), and Maryland v. EPA, 530 F.2d 215, 226 (4th Cir. 1975).

[441] District of Columbia v. Train, 521 F.2d 971, 992 (D.C. Cir. 1975).

[442] The Ninth Circuit also pointed to limits imposed by guaranty clause, U.S. CONST. art. IV, § 4, Brown v. EPA, 521 F.2d 827, 840-42 (9th Cir. 1975). The District of Columbia Circuit appeared to rule that the Administrator's actions exceeded both the commerce clause and the Clean Air Act. District of Columbia v. Train, 521 F.2d 971, 992-94 (D.C. Cir. 1975). The Fourth Circuit spoke more generally of "state sovereignty." Maryland v. EPA, 521 F.2d 215, 225-26 (4th Cir. 1975).

[443] Justice Stevens criticized the Court for trying to avoid it initially:

> The action the Court takes today is just as puzzling as the federal parties' position. Unless and until the Environmental Protection Agency rescinds the regulations in dispute, it is perfectly clear that the litigation is not moot. Moreover, an apparent admission that those regulations are invalid unless modified is not a proper reason for vacating the Court of Appeals judgments which invalidated the regulations.
>
> . . . By vacating the judgments below, the Court hands the federal parties a partial victory as a reward for an apparent concession that their position is not supported by the statute.

EPA v. Brown, 431 U.S. 99, 104 (1977) (Stevens, J., dissenting).

[444] The decision in *Brown* can be viewed as "a legislative remand for Congress to correct deficiencies in the 1970 Act." Brady & Downing, *supra* note 431, at 160-62. Yet, the 1977 Amendments made no relevant changes in the provisions regarding the categories of actors subject to EPA sanctions. *Compare* 42 U.S.C. § 1857c-8(a)(1) to 8(a)(2) (1970) *with* 42 U.S.C.A. § 7413(a)(1) to (a)(2) (1979) (identical: "any person" in violation of SIP); *compare* 42 U.S.C. § 1857c-8(b) (1975) *with* 42 U.S.C. § 7413(b) (1978) (slight modification on other grounds); *compare* 42 U.S.C. § 1857(e) (1970) *with* 42 U.S.C.A. § 7602(e) (1979) (both defining "person" to include "State, municipality [and] political subdivision"). *See generally* Brown v. EPA, 521 F.2d 827, 833-34 (9th Cir. 1975), *vacated and remanded*, 431 U.S. 99 (1977). The 1977 Amendments did, however, make two important changes which may well affect the actual operation of the federal-state partnership. See notes 466 & 470 *infra* and accompanying text.

League of Cities ruling, has reinstated its earlier decision, despite amendments to the SIP and the presentation of more subtle arguments by the EPA.[445]

3. Federal Financing of State and Local Environmental Activities

The court of appeals decisions denying EPA authority to impose enforcement duties on state and local governments suggested that national environmental policies might instead be achieved through conditional federal funding.[446] Congress adopted a limited form of this approach in section 129 of the Clean Air Act of 1977,[447] which prohibits the EPA to make any grants under the Act to a state which has no implementation plan for attainment of national primary ambient standards[448] or which has failed to implement any requirement of its SIP.[449] It also forbids any federal government authority to fund, license, approve or "support in any way" activities that do not conform to the applicable SIP.[450] Two questions are presented by this financial carrot-and-stick approach: (1) does it face any of the constitutional barriers considered above, and (2) can it successfully achieve national air quality goals?

As explained at greater length above,[451] the state sovereignty constraints upon legislation based on the commerce clause do not apply when Congress exercises its power under the spending clause. Since Congress is providing (or is threatening to remove) funds for the very program to which federal requirements are attached, there is no interference with the service-provider role of the state and local governments which accept the grant. They can simply refuse to initiate the program and thus avoid being forced to decide between loss of essential funds and compliance with federal government dictates. Similarly, the potential infringement upon self-rule created by having to comply with federal administrative, rather than local constitutent, demands can be avoided by simply refusing the funds initially.[452] Yet, the spending power is not unlimited; the very factors which allow it to be so expansive also suggest its limits. Since a state or local government must be able to maintain its autonomy by opting out of a federal grant program that has unacceptable

---

[445] *See* Brown v. EPA, 566 F.2d 665 (9th Cir. 1977) (rejecting EPA's claim that states could be required to adopt such programs because they had contributed to air pollution by building highways and other indirect sources). The District of Columbia Circuit also reinstated portions of its earlier ruling and allowed the parties to prepare a more complete administrative record, which could also form the basis of a new appeal to the Supreme Court. *See* District of Columbia v. Costle, 567 F.2d 1091 (D.C. Cir. 1977).

[446] Maryland v. EPA, 530 F.2d at 228 (speaking of the "alternative whip of economic pressure and seductive favor"); District of Columbia v. Train, 521 F.2d at 993 n.26; Brown v. EPA, 521 F.2d at 840.

[447] 42 U.S.C.A. § 7406(a), (b) (1979).

[448] *Id.* at § 7506(a)(3).

[449] *Id.* at § 7506(b).

[450] *Id.*

[451] See notes 298-307 *supra* and accompanying text.

[452] *See* North Carolina v. Califano, 435 U.S. 962 (1978), *aff'g* 445 F. Supp. 532 (E.D.N.C. 1977); Stewart, *supra* note 262, at 1254-55 ("conditions reasonably related to the purpose of federal spending programs will not be invalidated unless they impose quite extreme or unusual constraints on the structure of state governments").

conditions attached, the federal government may not tie disbursement of its funds for one activity to compliance with federal regulations in a totally unrelated field.[453]

Thus, the Clean Air Act funding requirements discussed above[454] should pass constitutional muster so long as they are enforced by the EPA and other federal authorities in connection with programs that have a reasonable relationship to air quality control.[455] Indeed, more far-ranging penalties for states that fail to meet federal environmental protection goals[456] could be added to federal airport, highway, and conservation grant programs.[457]

Although the constitutional hurdles can be cleared, the overall effectiveness of this carrot-and-stick spending approach is problematic at best. The cost of direct federal enforcement, or of payment for a substantital portion of state enforcement efforts,[458] may be prohibitive.[459] Moreover, one prominent commentator predicts "serious political and bureaucratic obstacles to actually terminating federal grants or making the threat of termination credible. If actually put to the choice, state [and local] officals may often prefer to sacrifice the money rather than adopt unpopular environmental measures."[460] In fact, the EPA would be cutting off the lifeblood of its own programs were it to terminate aid under the Clean Air Act.[461] While attempts to penalize

---

[453] Indeed, it is generally agreed that to allow the federal government to use its grants in such a circuitous fashion to induce compliance in a second, unrelated field would be to afford Congress a way of exercising its spending power where it is not spending at all. *See* L. TRIBE, *supra* note 305, at 18-19; Stewart, *supra* note 262, at 1257-59; *Zoning*, *supra* note 159, at 1616. Such indirect conditions would, however, be acceptable if Congress could regulate the second field directly under one of its powers. Thus, there may be limits to such use of the spending power in the environmental area precisely because of the barriers to use of the commerce clause power to compel states to regulate pollution sources with limited spillover effects. See notes 440-45 *supra* and accompanying text.

[454] See notes 447-50 *supra* and accompanying text.

[455] For example, to refuse funding for a sports area, parking facility, or other indirect pollution source that did not comply with an adopted or promulgated SIP would probably not violate any *National League of Cities* principle. However, refusal of a grant for police rookie weapons training because some police cars were not in compliance with the SIP emission standards would be more questionable.

[456] The model could be provisions used in the Billboard Control Program. *See* 23 U.S.C. § 131 (1976); MANDELKER & NETSCH, *supra* note 13, at 555-88; Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 72 MICH. L. REV. 1295 (1973).

[457] *See Zoning*, *supra* note 159, at 1617.

[458] Professor Tribe argues that Congress exceeds it spending power when it imposes regulatory burdens that are not substantially covered by the federal subsidy involved. *See* TRIBE, *supra* note 26, at 315-16; L. TRIBE, *supra* note 305, at 19.

[459] While it is extremely difficult to estimate the cost of a full-scale federally administered pollution-control program, it is worth noting that, for fiscal 1979, $25 million was appropriated to pay states for implementation and $12.6 million for federal administration of the relatively small, federally directed hazardous waste program. 42 U.S.C. §§ 6916, 6931 (1977). *See generally* Andersen, *supra* note 422, at 658-59. Limited federal demonstration projects are also extremely expensive.

[460] Stewart, *supra* note 262, at 1262.

[461] *See generally* Henderson & Pearson, *supra* note 412, at 1440, and sources cited therein.

states by reducing grants in related areas involve less of an internal contradiction, they will face even more extreme bureaucratic barriers.[462]

EPILOGUE

The emerging pattern of Burger Court decisions here described—deference to local government self-rule, recognition of congressional modifications of the individual rights/self-rule balance, and opposition to direct federal conscription of the state and local service-provider role—suggests the broad outlines of the script for various political dramas of the 1980's. The Court's development of the quasi-constitutional principle of self-rule has provided local government officials with substantial discretion in many aspects of land-use, finance, organizational and electoral structure, and employment. Given the setting in which they must perform—local financial crises exacerbated by national inflation, recession, and energy shortages—local officials will exercise this discretion in a way intended to maximize tax revenues and minimize expenditures. Persons and groups disadvantaged by these self-rule programmatic choices—those excluded from residential communities or local government workforces—will be forced to turn to state legislatures, state courts,[463] or Congress for redress.

Congress, the Burger Court has acknowledged, has broad authority to expand substantive individual rights, increase access to federal courts, and enlarge the remedies available. It also has substantial power to adopt social programs which promote societal goals that differ substantially from those of many state and local governments.[464] Insofar as these federal programs require monitoring of individual citizens, distribution of personal benefits, or imposition of penalties on a decentralized basis, however, their administrators face severe practical difficulties created by size, distance, and cost.

1. Intergovernmental Relations

Because of the Burger Court's articulation of constitutional barriers to federal interference with "state sovereignty," federal agencies will be forced into an elaborate bargaining relationship with state and local governments over use of the latter's police power, tax revenues, and manpower resources to administer and enforce the federal health care, pollution control, and energy programs of the 1980's. This article and others which focus upon the legal restraints on this multi-faceted negotiation process rarely capture the full richness of the resulting political dramas.

---

[462] In particular, other federal agencies may fight attempts to prevent them from furthering their own programmatic goals through intergovernmental aid. *See* Downing & Brady, *supra* note 412, at 280-81.

[463] At least with respect to land use policies, those being excluded can apparently expect only the most limited response from state legislatures and courts. *See* McDougal, *supra* note 31, at 319-41.

[464] The activities of the agencies administering these programs may also involve expansion of individual and group rights. See notes 250-56 *supra* and accompanying text.

Both state and federal officials can employ a variety of bargaining strategies within the broad legal parameters established by the Burger Court. Federal officials can, for example, threaten to preempt a field, by handling all enforcement themselves. Because of the prohibitive cost, however, this particular threat generally lacks credibility. Alternatively, Congress could give federal officials authority to intervene in crucial aspects of a regulatory program while still leaving ordinary administration in the hands of the state.[465] Local officials may, however, demand more specific rewards before giving their full cooperation in implementing daily administrative details.

Traditionally the federal government has purchased state and local cooperation through grants-in-aid, assuring proper performance by manipulating the strings attached to these grants. This incentive approach can be further developed by allowing cooperative states to gain financial benefits directly from the regulatory program itself. The delayed compliance penalty introduced by the Clean Air Act Amendments of 1977[466] had this feature. Similarly, if motorists (or energy users) were assessed a set fine for violation of pollution standards (or temperature limitations) the states would have an incentive to create inspection programs allowing them and their local governments, rather than the federal government, to collect the fines.

In the current era of declining local revenues, the threat of reducing federal funds to those localities which do not comply with federal goals is likely to become increasingly important. Although still somewhat problematic,[467] the EPA already has authority to threaten reduction not only of its own grants but also of grants in related fields. This approach could be developed into a more comprehensive strategy if nonpecuniary incentives, such as access to newer energy resources or temporary dispensation from energy limitations, were made available to federal officials as a bargaining chip. This would, however, require much greater coordination of national environmental, energy, and economic planning than has been possible in the past.

Another important strategy for both sides is to bring other actors onto the stage. For example, the federal government might delegate enforcement and other authority to local governments willing to cooperate with federal policies, thus by-passing apathetic or even negative state government officials.[468] Congress might also persuade some citizens to leave their role as

---

[465] This approach is illustrated by the EPA powers to promulgate provisions of an air pollution SIP and to prosecute exemplary cases when states fail to act. See notes 433-34 *supra* and accompanying text.

[466] *See* Pub. L. No. 95-95, §§ 112, 118, 42 U.S.C.A. §§ 7413(d), 7420 (1979). In requiring a major stationary source to pay as a penalty an amount equal to the economic advantage it gains from failure to comply with the SIP by July 1, 1979, these provisions provided an important financial incentive for states to enter "final compliance orders" quickly so that the compliance penalty would accrue to their enforcement agencies rather than to the federal government. *See* Downing & Brady, *supra* note 412, at 282-82.

[467] See notes 444-50 & 460-62 *supra* and accompanying text.

[468] *See, e.g.*, 42 U.S.C. § 7410(c)(3) (1978) (permitting EPA Administrator to delegate to a general purpose local government with "adequate authority under State or local law . . . the authority to implement and enforce" the SIP within its area). If federal delegation to local officials became a common practice, state legislatures might attempt to limit the authority of local governments to administer these federally

audience of the state-federal political dramas and become participating actors. For example, it could reduce standing and other barriers to court access for groups with interests parallel to those of the federal programs.[469] Similarly, it could provide benefits for (or reduce burdens upon) citizens in states with a federally approved implementation plan.[470] Citizens seeking to obtain these benefits (or to remove the burdens) are likely to press their states to adopt the needed plan. But two can play at this game of undercutting political support. Since states and localities are well represented in Congress, they could make their interests felt by pressing for amendments to federal agency enabling acts.[471]

---

created programs. Not only would home rule municipalities be able to resist some of these attempts under state law, but federal delegations could probably be made broad enough to expand the powers even of non-home rule local governments. *See generally* MANDELKER & NETSCH, *supra* note 13, at 546-50.

[469] As the names of many of the most important cases attest, private environmental groups have played an important part in the enforcement of federal environmental protection statues. Also, most civil rights cases are pursued by private litigation. The statutory authorization of attorney's fee awards has provided substantial encouragement for these suits. See note 375 *supra*.

[470] The nonattainment area provisions of the Clean Air Act, added in 1977 by Pub. L. No. 95-95, § 108(b), may operate in this manner. They authorize the EPA Administrator to approve a SIP if and only if:

> It provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area . . . to which such sub plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such [SIP] meets the requirements of [sections 7501-08].

42 U.S.C.A § 7410(a)(2)(I) (1979). Thus, in any "nonattainment area," *i.e.*, one in which the concentration of a particular pollutant (*e.g.*, a photochemical oxidant) exceeded the national standard on August 7, 1977, *see id.* at §§ 7407(d)(1), 7501(2), no stationary source emitting 100 tons or more per year of that same pollutant, *id.* at § 7411(a), may now be constructed or modified unless the SIP includes revised, stricter air pollution controls described in *id.* at § 7502. *See also id.* at §§ 7501, 7503-04. It will thus be in the developmental and competitive self-interest of an individual or corporation seeking to construct or modify a factory within a nonattainment area to persuade the state government to include the Section 7502 provisions in its SIP.

Initially, one might have anticipated judicial hostility to these provisions, given the wide sweep of the nonattainment area definition, *see* H.R. REP. No. 294, *reprinted in* [1977] U.S. CODE CONG. & ADMIN. NEWS 1472 (additional views by Reps. Krueger, Gammage, and Satterfield), and the striking similarity of the relevant provisions, 42 U.S.C.A. § 7502(b)(7), (10), (11) (1979), to the regulatory language disapproved in the *Brown* companion cases. See notes 440-42 *supra* and accompanying text. Yet, the Ninth Circuit recently affirmed a district court's refusal to grant an injunction against EPA's ban on all major industrial construction in California's nonattainment areas. Pacific Legal Foundation v. Costle, 11 ENVIR. REP. 667 (BNA) (9th Cir. Aug. 12, 1980) (ruling appellants, a public interest law firm, had failed to show likelihood of success on merits of statutory or constitutional attacks on the ban). *See* N.Y. Times, Aug. 26, 1979, at A 25, col. 2 (describing the ban); *see generally* 45 Fed Reg. 62,850 (Sept. 22, 1980) (EPA) proposed rule exempting from construction ban political subdivisions with approved nonattainment plans even though entire nonattainment area in which they are located lacks such an approved plan).

[471] *See* Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

2. Citizen–Local Government Relations

While the urban fiscal crisis and the taxpayer's revolt will significantly limit the scope of local government, they need not signal its demise. Local governments will continue to affect the lives of their citizens in important ways. In their self-rule capacity, they will become involved in innumerable conflicts with local property owners—some seeking to reduce their tax bills, others seeking to prevent regulation that lowers their property values.

Local governments can also continue to provide an important avenue for citizen participation and influence with respect to the creation, maintenance, or termination of certain basic services. But these local citizen demands will have to compete with substantial state and federal government pressures, coupled with financial incentives. In particular conflicts, local officials will side with the federal rather than their state government. In others, all three levels will agree upon particular policies, and the local government will serve simply as an enforcement body that interacts directly with citizens. The long-term ability of local governments to maintain an even partially autonomous position in this bargaining with the state and federal governments will depend not on the Court's defense of "state sovereignty" or "self-determination," but on the ability of local governments to obtain discretionary funds—via these higher level governments, from their own taxpayers, or through fiscal/structural reform.[472]

---

[472] A more complete phrase would be "structural reform with fiscal implication." This may involve internal matters (administrative reorganization), transfer of functions (airport or sewage plant to separately funded authority), tax-sharing among contiguous local governments, or far-ranging structural reform of several local governments (regionalism, metropolitan federation). *See generally* MANDELKER & NETSCH, *supra* note 13, at 405-528; Gelfand, *Decentralization*, *supra* note 18.